

**ANONYMOUS GRAND JUROR #1,**

*Plaintiff*

v.

**COMMONWEALTH OF KENTUCKY,**

*Defendant*

*\* Electronically filed \**

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**COMMONWEALTH OF KENTUCKY'S MOTION TO DISMISS AND  
RESPONSE TO PLAINTIFF'S MOTION FOR RELEASE OF GRAND JURY  
TRANSCRIPTS/RECORDINGS/REPORTS AND FOR DECLARATION OF  
RIGHTS PURSUANT TO KRS 418.040**

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Like the Attorney General,<sup>1</sup> the Commonwealth's Attorneys' Association has grave concerns about ensuring the secrecy of grand jury proceedings.<sup>2</sup> Those concerns are well-founded and are based on centuries of history, practice, and custom in the country and the Commonwealth, not to mention future repercussions.

Those same considerations led state and federal courts in Missouri to reject a grand juror's request to invalidate grand jury secrecy in a nearly identical context. In the wake of the police shooting of Michael Brown in Ferguson, Missouri in 2014, a grand jury was empaneled to investigate and consider whether to bring charges

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<sup>1</sup> The Attorney General has been clear that he does not object to any person stating his or her opinion regarding the decisions his office made, including the investigation's finding that Sergeant Mattingly and Detective Cosgrove were justified. But there is a remarkable difference between stating an opinion as to a public official's decision and revealing a proceeding that the Kentucky Supreme Court, through case law and the Rules of Criminal Procedure, has made confidential.

<sup>2</sup> See Statement of the Kentucky Commonwealth's Attorneys' Association, attached as Exhibit 1.

against the Ferguson police officer involved. *See Doe v. Bell*, 367 F. Supp. 3d 966, 969 (E.D. Mo. 2019).<sup>3</sup> The grand jury declined to charge that officer. *Id.* Subsequently, one of the grand jurors asked four courts for permission to “speak out about her experience as a grand juror” and “express opinions about the evidence and the investigation.” *Id.* Because “grand jury secrecy is intended to protect the public welfare,” *id.* at 972, each of those courts—two state and two federal—refused that request. So in a case raising the same issue arising from a tragic death in the context of an investigation as highly publicized as this one, each court that considered the matter concluded that the secrecy of the grand jury proceedings is vital to the proper administration of justice.

This Court should do the same. The Commonwealth of Kentucky therefore moves to dismiss this action pursuant to CR 12 and CR 41.02. Even without dismissal, the Court should deny Plaintiff’s Motion for Release of Grand Jury Transcripts/Recordings/Reports and for Declaration of Rights pursuant to KRS 418.040.<sup>4</sup>

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<sup>3</sup> *Doe* was affirmed by the Eighth Circuit in *Doe v. Bell*, 969 F.3d 883 (8th Cir. 2020). Separately a Missouri trial court’s denial of the grand juror’s request was affirmed in *Doe v. McCulloch*, 542 S.W.3d 354 (Mo. Ct. App. 2017). For the Court’s convenience, these opinions are attached collectively as Exhibit 2.

<sup>4</sup> Plaintiff also asks this Court to order the Attorney General to release the recording of the grand jury proceedings. However, that request is moot. In *Commonwealth v. Brett Hankison*, Case No. 20-CI-001473, the court previously ordered the Attorney General to file the recordings of the grand jury proceedings no later than October 2, 2020, and the Attorney General has complied with that order. Thus, the grand jury recordings are publicly available to the extent permitted by the court’s order.

## PRELIMINARY STATEMENT

It “is the public policy of this commonwealth to keep secret the proceedings of the grand jury.” *Bazzell v. Illinois Cent. R. Co.*, 262 S.W. 966, 967 (Ky. 1924). The confidentiality of grand jury proceedings is important. Grand juries “are required to consider thousands of cases in the Commonwealth every year.”<sup>5</sup> Here, and in all grand jury proceedings, RCr 5.24 declares the Commonwealth’s time-honored policy that grand jury proceedings are conducted in secret and remain secret once concluded. This “ancient rule of secrecy,” is well-established in the Commonwealth.<sup>6</sup> *Bazzell*, 262 S.W. at 967.

Despite this, an alleged grand juror now asks the Court to set aside the secrecy requirements of a grand jury so that he or she may comment at will on its proceedings. In the paradox of all paradoxes, the grand juror wishes to do so *anonymously*. While the *duty* of a grand jury to meet in secret is firmly established, the right of the alleged grand juror to proceed anonymously is anything but.

The Plaintiff suggests that the public interest is somehow advanced by destroying the principle of secrecy that serves as the foundation of the grand jury system. (Motion at ¶12). For this reason, the Plaintiff asks the Court to declare that grand jurors have the right “to disclose information and details about the process and details of the grand jury proceedings . . . regarding the Breonna Taylor case and any

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<sup>5</sup> Statement of the Kentucky Commonwealth’s Attorneys’ Association, attached as Ex. 1.

<sup>6</sup> *See generally* Statement of the Kentucky Commonwealth’s Attorneys’ Association at Ex. 1.

potential charges and defendants presented or not presented related to the events surrounding that matter.” (*Id.* ¶18).

This Office commends the grand jurors for the important work that they performed, and in no way intends to impugn that work. But an explanation of how the grand jury works is required.

The Plaintiff served as a grand juror for weeks before this Office made its presentation. (*See* Exhibit 1 to Motion (ordering the Plaintiff to serve as a grand juror for the month of September)). Although the Plaintiff relies upon the Jefferson County Grand Jury Handbook, which encourages grand jurors to share their experiences in the criminal justice system, that handbook also includes an important caveat that grand jurors do so “without divulging the content of any Grand Jury hearing”—consistent with the requirements of RCr 5.24. (*See* Jefferson County Grand Jury Handbook at 18, attached as Exhibit 3). That same handbook also makes clear that “[a]fter hearing testimony from the victim, the police or other witnesses, the Grand Jury may decide that there are other witnesses or evidence it needs in coming to a decision. By majority vote, the Grand Jury may request that subpoenas be issued for additional witnesses or evidence.” (*Id.* at 8). Grand jurors are even encouraged to talk with fellow jurors about other evidence that they believe may explain the charges against a subject, and if a majority of the grand jurors agree, they may “have the foreperson notify the Commonwealth’s Attorney to subpoena the necessary person or information.” (*Id.* at 15; *see also* RCr 5.06).

The handbook also makes clear that “[t]he Grand Jury is an independent accusatorial and investigative body,” but that “individual Grand Jurors are not authorized to conduct an investigation; all actions taken by the Grand Jury must be as a group.” (Jefferson County Grand Jury Handbook at 13, attached as Exhibit 3). “Because of the secrecy of the hearing no one may inquire into what [the grand jurors] have done.” (*Id.* at 15). Importantly, because the grand jury acts as a body, “[a]ll jurors have an equal voice in determining whether there is sufficient evidence to believe the accused committed the crime charged.” (*Id.*; *see also* Ky. Const. § 248 (requiring 9 of the 12 to concur in an indictment); KRS 29A.200 (same)). And as important, no one grand juror, such as Plaintiff here, has the right to speak for the grand jury, or to disregard the important rule of grand jury secrecy. For that reason, any suggestion by the Plaintiff that the grand jury was somehow barred from hearing from any witnesses it wished (Motion at ¶ 20), is belied by the rules and processes for conducting grand juries throughout the Commonwealth.

Moreover, as the handbook makes clear, “[t]he Grand Jury has the right to exclude the attorney for the Commonwealth while questioning witnesses.” (Exhibit 1 at 9; *see also* RCr 5.02). It is certainly the case that the prosecutor serves as “the legal advisor to the grand jury” (Exhibit 1 at 10; *see also* RCr 5.14), but the grand jury remains in charge of its deliberations and conclusions.

Despite the clear instructions in the handbook on which Plaintiff relies (*see, e.g.*, Motion at ¶ 14), Plaintiff seeks to set aside long-standing rules and foundational principles, preferring instead to anonymously substitute his or her own judgment

regarding the importance of secrecy and how best to administer the criminal justice system in the Commonwealth.

In the end, the Office of the Attorney General presented a case to the grand jury—a tragic case at that. As the recordings demonstrate, the grand jury actively listened, asked questions, and performed its duty. Upon completion of the presentation, the Office of the Attorney General made a recommendation to the grand jury, and the grand jury voted to follow that recommendation.

### **RELEVANT FACTS**

On March 13, 2020, Louisville Metro police executed a search warrant at the home of Ms. Breonna Taylor. Tragically, Ms. Taylor died during the execution of that search warrant after Kenneth Walker fired upon police officers, who returned fire. At the request of the Jefferson County Commonwealth’s attorney, the Office of the Attorney General assumed jurisdiction as special prosecutor to investigate the conduct of the officers. At the conclusion of that investigation, the Attorney General’s Office presented its results to the Jefferson County grand jury.

Following that presentation, the grand jury indicted one of the three officers on three counts of wanton endangerment in the first degree, and that officer was subsequently arraigned. *See Commonwealth v. Brett Hankison*, Case No. 20-CR-001473 (Jefferson Cir. Ct. Div. 13). Consistent with that indictment, the Office of the Attorney General will prosecute the officer who was indicted by the grand jury. The grand jury did not indict the other two officers that executed the search warrant.

Now, despite the Commonwealth’s long tradition of grand jury secrecy, a former member of the grand jury that indicted one of the officer involved in the March 13 incident, seeks a declaration that would permit each of the grand jurors to “disclose information and details about the process of the grand jury proceedings . . . .” (Motion at 1). For the reasons that follow, that request should be denied.

### ARGUMENT

The Plaintiff’s purported action should be dismissed and his or her Motion should be denied for four reasons. *First*, the Plaintiff has failed to properly initiate this request for a declaratory judgment. *Second*, the Plaintiff lacks standing to seek the declaration requested. *Third*, grand jury proceedings are secret for a reason, and the Plaintiff has failed to demonstrate why that secrecy should be eliminated. *Fourth*, Plaintiff seeks a declaration that is inconsistent with the text of RCr 5.24.

#### **I. The Plaintiff failed to properly initiate the action or serve the Commonwealth with process, leaving the Court without jurisdiction.**

Even assuming the Plaintiff’s Motion seeks a proper end, the rules to achieve those ends matter, and the Court should ensure they are followed.<sup>7</sup> The Rules of Civil Procedure provide that a “civil action is commenced by the filing of a complaint with the court and the issuance of a summons . . . in good faith.” CR 3.01. The complaint must “include the names of all parties,” CR 10.01, and must “be prosecuted in the name of the real party in interest,” CR 17.01. Once filed, the complaint and summons must be served. CR 4.01; CR 4.03; CR 4.04(1). And under KRS 418.010, a motion for

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<sup>7</sup> Service of process was not sufficient here. For that reason, Plaintiff’s request should be denied and this case should be dismissed. CR 12.02(d), (e).

declaratory judgment must be served “at least ten (10) days before the motion is made” and “be served by an officer authorized to serve a summons, and the service and return shall be made in the manner prescribed for service of summons by the Rules of Civil Procedure.” KRS 418.010(1). None of this has happened here. The purported grand juror who brings this action has not complied with any of these bedrock procedural requirements for bringing a civil action in a Kentucky. The “motion” for a declaration of rights should, therefore, be dismissed pursuant to CR 12 and CR 41.02.<sup>8</sup>

Moreover, Kentucky courts have permitted the use of pseudonyms in litigation only to protect the identity of victims and children. *See, e.g., Tackett v. Commonwealth*, 445 S.W.3d 20, 24 n.1, 46 n.8 (Ky. 2014). The alleged grand juror here is neither, and the Plaintiff has failed to cite any statute, case, or rule that would permit him or her to proceed anonymously. CR 10.01’s requirement to name the parties means “exactly what it says” and “a complaint which does not include the names of all the parties in the caption, or style, does not comply with the rule.” *McCoy v. Western Baptist Hosp.*, 628 S.W.2d 634, 636 (Ky. App. 1981). In fact, “where a timely objection is raised to failure to comply with the rule, the action must be dismissed.”<sup>9</sup> *Id.* Rather than comply with the Civil Rules, the Plaintiff seeks declaratory relief against the Commonwealth through a severely abridged

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<sup>8</sup> CR 41.02 provides that a defendant may move for dismissal due to “failure of the plaintiff to prosecute or to comply with these rules.”

<sup>9</sup> The Commonwealth, through the Attorney General, appeared at the telephonic hearing on October 5, 2020. The Commonwealth notified the Court of the lack of service and requested time to brief the issue. This filing is made in response to the Court’s order and is filed without waiving any objection to the jurisdiction of this court and the insufficient service of process.

proceeding. And the requested relief will have far-reaching implications and “possible effect[s] upon the functioning of future grand juries.” *Douglas Oil Co.*, 441 U.S. at 222 (explaining the substantial and weighty reasons for grand jury secrecy).<sup>10</sup> For these reasons, the Court should deny the Plaintiff’s request and dismiss this action.

## **II. The Grand Juror does not have standing to seek relief under KRS 418.040.**

Insofar as Plaintiff seeks declaratory relief, the Plaintiff fails to meet another threshold requirement. To obtain declaratory relief under KRS 418.040, the Plaintiff must demonstrate that “an actual controversy exists.”<sup>11</sup> That is because Section 112(5) of the Kentucky Constitution limits this Court’s jurisdiction to “justiciable causes.” *See Berger Family Real Estate, LLC v. City of Covington*, 464 S.W.3d 160, 166 (Ky. App. 2015); Ky. Const. § 112. Standing is an integral part of the “justiciable cause” requirement. *See Lawson v. Office of Attorney General*, 415 S.W.3d 59, 67 (Ky. 2013). To establish standing, a plaintiff must prove (i) an injury-in-fact that (ii) is caused by the defendant and (iii) can be redressed by the court. *Commonwealth Cabinet for Health & Family Servs., Dep’t for Medicaid Servs. v. Sexton by & through Appalachian Reg’l Healthcare, Inc.*, 566 S.W.3d 185, 196 (Ky. 2018) (quoting *Lawson*, 415 S.W.3d at 67). That means a plaintiff must demonstrate “a concrete and particularized injury that is either actual or imminent,” and is not “abstract or conjectural or hypothetical.” *Sexton*, 566 S.W.3d at 196 (cleaned up); *see also*

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<sup>10</sup> *See also* Statement of the Kentucky Commonwealth’s Attorneys’ Association, attached as Ex. 1.

<sup>11</sup> Again, to the extent that the Grand Juror relies upon the handbook provided to Jefferson County grand jurors, that document clearly admonishes grand jurors “not to divulg[e] the content of any Grand Jury hearings.” (*See* Commonwealth of Kentucky Grand Jury Handbook at 18, attached as an Exhibit to Juror’s Motion). It is not inconsistent with RCr 5.24 and it is no basis for an “actual controversy.”

*Overstreet v. Mayberry*, 603 S.W.3d 244, 249 (Ky. 2020) (requiring a plaintiff to establish “an injury in fact that is concrete, particularized, and actual or imminent” to prove constitutional standing). And the injury must be fairly traceable to the defendant, meaning that “relief from the injury must be likely to follow from a favorable decision.” *Sexton*, 566 S.W.3d at 196 (cleaned up). When courts decide matters in the absence of a justiciable case or controversy, they disregard the constitutional prohibition against issuing advisory opinions. Moreover, “[i]t is well-settled that ‘allegations of possible future injury do not satisfy the requirements of standing.’” *Commonwealth v. Bredhold*, 599 S.W.3d 409, 417 (Ky. 2020) (cleaned up) (quoting *Whitmore v. Arkansas*, 49 U.S. 149, 158 (1990)).

The Plaintiff’s request for declaratory judgment fails to allege an actual or imminent injury sufficient to invoke this Court’s jurisdiction. Instead, the Plaintiff expressly claims “[t]his request is for declaratory relief from a fear of prosecution for disclosing information that was not a part of the grand jury proceedings and for a finding that it is permissible by law and not subject to civil or criminal liability to so disclose.” (Motion at ¶ 21). In fact, the Plaintiff states that this “fear” is the very basis for the alleged “actual controversy.” (*See id.* at ¶ 22, 23). But such “fear” is not the type of “concrete and particularized injury” sufficient to establish standing and is, instead, “abstract,” “conjectural,” and “hypothetical.” *Sexton*, 566 S.W.3d at 196. Without knowing whether any proceeding for contempt will come, any possible injury to the Plaintiff “can only be viewed as hypothetical.” *See Bredhold*, 599 S.W.3d at 418.

In this way, this case mirrors *General Drivers, Warehouseman & Helpers Local Union No. 89 v. Chandler*, 968 S.W.2d 680 (Ky. App. 1998). There, the Teamsters “filed a declaratory judgment action with the trial court challenging the power of the Attorney General to conduct an investigation of the Teamsters for alleged campaign violations.” *Id.* at 682. In their complaint, “the Teamsters only allege[d] that they [might] suffer if an indictment [was] issued.” *Id.* at 684. But “[a]s of the time the Teamsters [had] filed their action, there had been no action directed at the Teamsters.” *Id.* at 683. For that reason, the Court of Appeals agreed that “the Teamsters lacked standing to pursue [their claims against the Attorney General] absent any concrete action taken directly against them.” *Id.*

The Plaintiff lacks standing for another reason. The alleged injury must be fairly traceable to the defendant, meaning that “relief from the injury must be likely to follow from a favorable decision.” *Sexton*, 566 S.W.3d at 196. But under RCr 5.24, it is the Court—and not the Commonwealth or the Attorney General—that may hold the Juror in contempt for violating the centuries-old secrecy requirement. *See* RCr 5.24(3). Thus, because the Jefferson Circuit Court has authority to enforce the grand jury secrecy rules against the Plaintiff, the Plaintiff cannot trace his or her “injury” to the Commonwealth or the Attorney General.

Because the Plaintiff fails to demonstrate standing, a threshold requirement to obtain declaratory relief under KRS 418.040, the Plaintiff’s request for declaratory relief should be denied.

### III. The Plaintiff has not met the high burden for the relief sought.

The grand jury, “itself a bulwark of freedom specifically recognized by the United States Constitution, is deeply embedded in the philosophy of human rights, dating back to early English law.” *Branzburg v. Meigs*, 503 S.W.2d 748, 751 (Ky. 1971). It “is an inquisitorial and accusing body.” *Matthews v. Pound*, 403 S.W.2d 7, 9 (Ky. 1966). In Kentucky, “the grand jury is an institution of constitutional origin . . . .” *Democratic Party of Kentucky v. Graham*, 976 S.W.2d 423, 427 (Ky. 1998) (citing Section 12 of the Kentucky Constitution). But the grand jury “is not an arm of the police,” rather it “is an instrument of the people, which on one hand insulates citizens from over-zealous prosecution, yet on the other hand has broad power to investigate criminal activities and other matters detrimental to the public interest.” *Branzburg*, 503 S.W.2d at 751. To do that work, Kentucky’s grand juries convene to “act[ ] in secret” and “to indict no one because of prejudice and to free no one because of special favor.” *Rice v. Commonwealth*, 288 S.W.2d 635, 638 (Ky. 1956). And it is the grand jury’s duty “to inquire into every offense for which any person has been held to answer and for which an indictment or information has not been filed, or other offenses which come to their attention or of which any of them has knowledge.” *Matthews*, 403 S.W.2d at 9 (citing RCr 5.02). For that reason, “the grand jury may summon witnesses and compel them to testify under oath.” *Id.* (citing RCr 5.04 and 5.12). And the Commonwealth’s attorney aids the grand jury in the performance of its duties by examining witnesses and giving legal advice. RCr 5.14(1). Moreover, it is the duty of

“[t]he attorney for the Commonwealth, or his designated assistant” to draft indictments as requested by the grand jury. RCr 5.14(1).

At the conclusion of its work, the grand jury must “report its action on such cases as have been submitted to it . . . .” *Matthews*, 403 S.W.2d at 9. In fact, “once it has been discharged, [the grand jury] cannot be called back to correct the report or to take further action.” *Id.* at 10; *see also Graham*, 976 S.W.2d at 427 (“Unlike some jurisdictions, a grand jury in Kentucky cannot file a report which reflects on the character of a citizen or public officer unless that report is accompanied by an indictment against that citizen or officer.”).

In Kentucky, “[f]rom earliest times it has been the policy of the law in furtherance of justice to shield the proceedings of grand juries from public scrutiny.” *Greenwell v. Commonwealth*, 317 S.W.2d 859, 861 (Ky. 1958). The *Greenwell* court explained that “[s]ecrecy is for the protection of the witnesses and the good names of innocent persons investigated but not indicted and is to inspire the grand jurors with a confidence of secrecy in the discharge of their duties.” *Id.* The grand jury’s secrecy should only be set aside “in a prosecution for false swearing or to contradict a witness on the trial of the defendant.” *Id.* The grand jury’s secrecy requirement is so sacrosanct that Kentucky’s high court ordered dismissal of an indictment when a court reporter remained present during grand jury deliberations and voting despite RCr 5.18’s requirement that “[n]o person other than the grand jurors shall be present while the grand jury is deliberating or voting.” *Vaughn v. Commonwealth*, 485 S.W.2d 497, 498 (Ky. 1972). Dismissal was ordered even though the court reporter “retired

to a corner of the room and faced the wall so that she could not see which members raised their hands as the votes were taken.” *Id.*

RCr 5.24(1) mandates the secrecy of grand jury deliberations. The United States Supreme Court has identified several important reasons for such secrecy: “(1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammelled disclosures by persons who have information with respect to the commission of crimes; (5) to protect innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt.” *United States v. Procter & Gamble Co.*, 356 U.S. 677, 681 n.6 (1958) (citing *United States v. Rose*, 215 F.2d 617, 628–629 (3d Cir. 1954)). Thus, according to the United States Supreme Court, parties seeking grand jury transcripts “must show that the material they seek is needed to avoid a possible injustice in another judicial proceeding, that the need for disclosure is greater than the need for continued secrecy, and that their request is structured to cover only material so needed.” *Douglas Oil Co. of California v. Petrol Stops Nw.*, 441 U.S. 211, 222 (1979). Moreover, the Supreme Court has held that “disclosure is appropriate only in those cases where the need for it outweighs the public interest in secrecy, and . . . the burden of demonstrating this balance rests upon the private party

seeking disclosure.” *Id.* at 223. As the Court explained: “[I]n considering the effects of disclosure on grand jury proceedings, the courts must consider not only the immediate effects upon a particular grand jury, but also the possible effect upon the functioning of future grand juries. Persons called upon to testify will consider the likelihood that their testimony may one day be disclosed to outside parties. Fear of future retribution or social stigma may act as powerful deterrents to those who would come forward and aid the grand jury in the performance of its duties.” *Id.* at 222. Accordingly, a court must carefully weigh “the competing interests in light of the relevant circumstances.” *Id.* at 223. Only where there is a “compelling necessity” that is shown with “particularity,” may the secrecy of grand jury proceedings be broken. *Procter & Gamble Co.*, 356 U.S. at 682 (citations omitted). These same considerations should apply with equal force when one seeks to disclose what occurred during otherwise secret grand jury proceedings. That has not happened here.

A Missouri state court denied a strikingly similar request from a former grand juror. In *Doe v. McCulloch*, Doe was a member of the St. Louis County grand jury that declined to indict former police officer Darren Wilson for actions related to the August 9, 2014 shooting of Michael Brown. 542 S.W.3d 354, 356 (Mo. Ct. App. 2017).<sup>12</sup> In seeking to lift the secrecy of the grand jury proceedings, Doe alleged that the prosecutor’s “handling of the case, such as how evidence was presented, differed significantly from how evidence was presented in the hundreds of other matters presented to her and the other empaneled grand jurors earlier that same term.” *Id.*

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<sup>12</sup> For the Court’s convenience, *Doe v. McCulloch* is attached as Exhibit 1.

(internal quotations omitted). Among other things, Doe alleged that “the evidence was presented in a way that implied Brown was the wrongdoer and not Wilson[.]” *Id.* On that basis, Doe sought “an exception to the secrecy obligations . . . to ‘speak publicly about her experience on the grand jury’ and ‘contribute to the current dialogue concerning race relations.’” *Id.*

The *McCulloch* court, however, noted that Doe did not “specify in her Petition what she would like to say, or what evidence or other materials, specifically, she would like to disclose. Rather, [Doe] allege[d] generally that she [wanted] to discuss her experiences as a grand juror,” and that she wanted to use her experience to “contribute to the current public dialogue concerning race relations, to educate the public, and to advocate for legislative change.” *Id.* at 359.

Citing the significant reasons for grand jury secrecy enumerated by the United States Supreme Court in *Procter & Gamble*, and even in the charged context of the Michael Brown’s shooting, the Missouri Court of Appeals rejected Doe’s request to “completely invalidat[e] Missouri’s grand jury secrecy laws as applied to her[.]” *Id.* The court’s decision was proper, especially where the grand juror was not seeking “an order that allow[ed] her to make certain disclosures for certain purpose[s]” and was only able to point to *one* Missouri case (which the court found wholly inapplicable) where an exception to that secrecy had been granted. *Id.*

As in *McCulloch*, Plaintiff here has provided no basis to overcome “the policy of the law in furtherance of justice to shield the proceedings of grand juries from public scrutiny.” *Greenwell*, 317 S.W.2d at 861. Plaintiff’s request should be denied

for several reasons. First, the Plaintiff's motion suggests that he or she seeks a blanket exception to the secrecy required by RCr 5.24. (*See, e.g.*, Motion at ¶ 24). As in *McCulloch*, Plaintiff "does not, in any way, limit the scope of the disclosures she seeks to make." *McCulloch*, 542 S.W.3d at 363. The Plaintiff's request should be denied. As the *McCulloch* court explained: "Affording a grand juror unrestrained ability to disclose her interpretation of what happened in the proceedings completely destroys the idea of secrecy, which is crucial to the proper functioning of the grand jury process; the secrecy requirement promotes vitally important interests, such as protecting the jurors themselves, encouraging prospective witnesses to come forward and speak candidly, protecting the integrity of the grand jury process by shielding witnesses from threats, bribes, or other means of inducing fabricated testimony[.]" *Id.* at 364 (collecting cases).

To the extent that the Plaintiff alleges that the Court's interest in grand jury secrecy is reduced since the grand jury has completed its work, the *McCulloch* court considered and rejected such a claim. Accepting "the idea that the benefits of grand jury secrecy are reduced after the proceedings at issue end," the *McCulloch* court reiterated the reasons "secrecy extend[s] beyond the particular grand jury at issue," which include: "the possible effect upon the functioning of future grand juries," the possibility and "[f]ear of future retribution or social stigma," and "future consequences." *Id.* at 364. As in *McCulloch*, Plaintiff "bears the burden of showing that the present need for disclosure outweighs the reasons for grand jury secrecy." *Id.* But as in *McCulloch*, the Plaintiff here fails to meet that burden.

Moreover, the Plaintiff's fear that his or her identity may be discovered, (Motion at ¶ 24), only bolsters the need for continued confidentiality under RCr 5.24(1). What about the other jurors? Secrecy will protect the identity not only of the Plaintiff—but also of each of the other jurors that composed the grand jury. (See Statement of the Commonwealth's Attorney Association at 2, attached as Ex. 1 (“Grand jury secrecy is founded primarily on the protection of the innocent, protection of the criminal defendant, and protection of the grand jurors themselves” (emphasis added)). Whereas the Plaintiff prefers to be able to speak freely—*though anonymously*—the motion fails to identify any reason with the “particularity” required by the Supreme Court to “outweigh the countervailing policy.” *Procter & Gamble Co.*, 356 U.S. at 682.

The Plaintiff points only to his or her desire to seek “truth” and “justice.” (Motion at ¶ 25). But the grand jurors were empaneled and charged by the court with achieving those goals during the grand jury's investigation. Specifically, the grand jurors were charged with inquiring “into every offense for which any person [had] been held to answer and for which an indictment or information [had] not been filed, or other offenses which [came] to their attention or of which any of them [had] knowledge.” RCr 5.02. Having discharged that duty, the grand jury's work—including that of the Plaintiff—is complete. If the grand jury cannot be called back to amend their report, *see generally Matthews*, 403 S.W.2d at 10 (holding that once the “work of the grand jury as a body is concluded by its report” and “it has been discharged, [the grand jury] cannot be called back to correct the report or to take further action”),

a single grand juror should not be granted leave to anonymously discuss the grand jury's proceedings. This is especially important while there is an on going criminal prosecution in another division of this Court that resulted directly from the grand jury deliberations. *See Commonwealth v. Brett Hankison*, Case No. 20-CI-001473 (Jefferson Cir. Ct. Div. 13).

Plaintiff here asserts nothing more than a general desire to discuss the grand jury deliberations. That is not sufficient to overcome the weighty presumption of secrecy. To sharpen the point, consider that not even a First Amendment claim would be a basis for invalidating the secrecy of the grand jury.<sup>13</sup> Again in the context of the shooting death of Michael Brown by an officer of the Ferguson, Missouri police department, a federal court considered a First Amendment claim brought by the same former grand juror in *McCulloch. Doe v. Bell*, 367 F. Supp. 3d 966 (E.D. Mo. 2019), *aff'd*, 969 F.3d 883 (8th Cir. 2020). There, a former grand juror sought to disclose the grand jury's deliberations because she wished to "aid in educating the public about how grand juries function" and to use her "own experiences to advocate for legislative change to the way grand juries are conducted in Missouri." *Doe*, 367 F. Supp. 3d at 977. The grand juror sought to speak about her experience as a grand juror, including "the discrepancies she noticed in the procedures utilized by [the prosecutor] in [one particular case] compared to others" and to address what she felt were "[mischaracterizations of] the views of the grand jurors collectively toward the

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<sup>13</sup> To be clear, Plaintiff raises no First Amendment claim. Instead, Plaintiff simply asserts that he or she prefers to anonymously discuss the grand jury's deliberations.

evidence, the witnesses' credibility, and the law[.]” *Doe v. Bell*, 969 F.3d 883, 886 (8th Cir. 2020).

In *Doe*, the district court held, and the Eighth Circuit agreed, that allowing the grand juror to make the proposed disclosures would “undermine the proper functioning of the Missouri grand jury system which depends upon the secrecy of grand jury proceedings.” *Doe v. Bell*, 367 F. Supp. 3d at 977. Moreover, the district court found that the grand juror expressly waived any First Amendment rights she had when she had taken the oath of secrecy required of grand jurors. *Id.* at 978. The Eighth Circuit affirmed this reasoning, even in a case where the names of the accused and the facts were as widely known by the public as are those that underlie this case. *Doe*, 969 F.3d at 893.

For all of these reasons, the Court should deny the Plaintiff's request for declaratory relief and maintain the “ancient rule of secrecy,” *Bazzell*, 262 S.W. at 967.

#### **IV. The Plaintiff seeks a declaration that is contrary to the express terms of RCr 5.24.**

The Plaintiff's request for a declaration must be denied for another reason: the Plaintiff asks this Court to make a declaration contrary to the clear words of RCr 5.24. According to the Plaintiff, RCr 5.24(1) “does not apply to anything that WAS NOT recorded as a part of the grand jury proceedings.” (Motion at ¶ 20). Plaintiff also claims, therefore, that the grand jury's deliberations “are well within the bounds of permissible disclosures to the public when those disclosures pertain to details and information tangent to, but not part of, the recorded grand jury proceedings.” (*Id.*). Thus, the Plaintiff claims that he or she should be granted leave to discuss what “did

not” happen during the proceedings, charges that were “not” presented, explanations of the law “not provided to the grand jury,” and witnesses that did “not” testify. (Motion at ¶ 20).

But that is word play. RCr 5.24 clearly demands that “all persons present during any part of the proceedings of a grand jury shall keep its proceedings and the testimony given before it secret.” RCr 5.24(1). Its provisions have no relation to what is or is not recorded and it matters not whether the grand juror speaks in the negative. Rather, RCr 5.24(1)’s command applies to all portions of the grand jury’s *proceedings*—regardless of what portions may have been recorded or however they are described. Although RCr 5.24 provides a mechanism by which the court may lift the secrecy on grand jury deliberations, this Court may not declare that RCr 5.24 says something that it does not. It simply defies logic for the Plaintiff to claim that any reading of the text of RCr 5.24 would permit a grand juror to discuss that which was *not* recorded.

### CONCLUSION

As both the state and federal courts in Missouri recently determined in the context of a case with as much public interest as this one (the Michael Brown shooting in Ferguson, Missouri), a request by a single member of a grand jury, or even the grand jury itself, cannot be permitted to overcome the important public interest of the Commonwealth in maintaining the proper functioning of the criminal justice system in general and the grand jury process in particular. The Commonwealth’s Attorneys’ Association agrees. This Court should reach the same conclusions as did

the Missouri court in *Doe v. McCulloch* and the Eighth Circuit Court of Appeals in *Doe v. Bell*, and deny Plaintiff's Motion for Release of Grand Jury Transcripts/Recordings/Reports and for Declaration of Rights.

Respectfully submitted,

**Daniel Cameron**  
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**CERTIFICATE OF SERVICE**

I certify that on October 7, 2020, a copy of the above was filed electronically with the Court and served by e-mail on the following:

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367 F.Supp.3d 966  
United States District Court,  
E.D. Missouri, Eastern Division.

Grand Juror DOE, Plaintiff,

v.

Wesely J. C. BELL,<sup>1</sup> in his official  
capacity as Prosecuting Attorney for  
St. Louis County, Missouri, Defendant.

Case No. 4:15 CV 6 RWS

Signed 02/05/2019

**Synopsis**

**Background:** Grand juror brought action against county prosecutor seeking injunctive relief and declaratory judgment that Missouri laws criminalizing juror's disclosure of information about her experience as a juror on grand jury violated her free speech rights under the First Amendment. Prosecutor moved to dismiss.

**Holdings:** The District Court, [Rodney W. Sippel, J.](#), held that:

[1] juror lacked standing to challenge statutes not enforceable by county prosecutor;

[2] juror had standing to bring claim seeking injunction barring enforcement of statute prohibiting disclosure of evidence and witness names revealed during grand jury proceeding;

[3] juror's First Amendment claim was ripe;

[4] juror's First Amendment claim was not barred by the Eleventh Amendment; and

[5] statute was not an unconstitutional restriction of free speech as applied to juror.

Motion granted.

See also [542 S.W.3d 354](#)

West Headnotes (15)

[1] **Declaratory Judgment** [Subjects of relief in general](#)

Grand juror lacked standing to seek declaratory judgment against county prosecutor stating that Missouri statute governing grand juror oath of secrecy, and statutes preventing witnesses who appeared before grand jury from violating oath of secrecy or revealing how any member of grand jury voted on any question or opinions expressed on any question chilled her right to free speech under the First Amendment, where statutes did not provide for criminal penalties, such that they were not enforceable by prosecutor unilaterally but instead enforcement authority fell within circuit court's powers of contempt, and declaratory or injunctive relief against prosecutor would not have resolved potential injury juror faced from state court contempt proceedings. [U.S. Const. Amend. 1](#); [Mo. Ann. Stat. §§ 540.080, 540.120, 540.310](#).

[2] **Federal Civil Procedure** [In general; injury or interest](#)

**Federal Civil Procedure** [Causation; redressability](#)

A plaintiff establishes Article III standing by showing that: (1) she has suffered an injury in fact that is actual or imminent; (2) the injury is fairly traceable to the challenged action of the defendant and not the result of some independent action of a third party not before the court; and (3) it is likely that the injury will be redressed by a favorable decision. [U.S. Const. art. 3, § 2, cl. 1](#).

[3] **Civil Rights** [Criminal law enforcement; prisons](#)

Grand juror had standing to bring claim against county prosecutor seeking injunctive relief barring enforcement of Missouri statute prohibiting disclosure of evidence and witness names revealed during grand jury proceeding, in action alleging that statute violated juror's free

speech rights under the First Amendment, where violation of statute was misdemeanor enforced by prosecutor, and juror's fear of prosecution was not speculative or imaginary, especially in light of possibility of being held in contempt in addition to being subject to criminal prosecution. [U.S. Const. Amend. 1](#); [Mo. Ann. Stat. § 540.320](#).

[4] **Civil Rights** 🔑 [Criminal law enforcement; prisons](#)

To establish standing to seek injunctive relief, a party need not expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights but he must show that his injury is more than imaginary or speculative.

[5] **Injunction** 🔑 [Mootness and ripeness; ineffectual remedy](#)

**Injunction** 🔑 [Criminal Matters and Proceedings](#)

Grand juror's claim against county prosecutor seeking injunctive relief barring enforcement of Missouri statute prohibiting disclosure of evidence and witness names revealed during grand jury proceeding was ripe; although prosecutor argued that claim was not ripe because juror had not alleged that she planned to disclose evidence or witnesses that had not been previously disclosed, statute did not allow juror to confirm that any previously disclosed evidence or witness name was correct, and juror alleged that she wanted to reveal her opinions about evidence and investigation of case, and that she wanted to express her opinion how the evidence in case was presented differently than in hundreds of other grand jury matters. [U.S. Const. Amend. 1](#); [Mo. Ann. Stat. § 540.320](#).

[6] **Federal Courts** 🔑 [Nature of dispute; concreteness](#)

In assessing ripeness, court focuses on whether a case involves contingent future events that may not occur as anticipated, or indeed may not occur at all.

[7] **Federal Courts** 🔑 [Prosecutors and attorneys general](#)

Grand juror's claim against county prosecutor alleging that Missouri statute prohibiting disclosure of evidence and witness names revealed during grand jury proceeding chilled juror's First Amendment rights was not barred by the Eleventh Amendment; although prosecutor alleged that he acted as officer of the state when conducting criminal prosecutions of state law, prosecutor was employee of county, and, even if prosecutor was deemed a state actor, juror only sought injunctive relief from enforcement of statute. [U.S. Const. Amends. 1, 11](#); [Mo. Ann. Stat. § 540.320](#).

[8] **Federal Courts** 🔑 [Suits Against States; Eleventh Amendment and Sovereign Immunity](#)

The Eleventh Amendment bars suits in federal court against a state by its own citizens. [U.S. Const. Amend. 11](#).

[9] **Federal Courts** 🔑 [Arms of the state in general](#)

**Federal Courts** 🔑 [Agencies, officers, and public employees](#)

Eleventh Amendment immunity extends to state agencies which are considered an arm of the State. [U.S. Const. Amend. 11](#).

[10] **Constitutional Law** 🔑 [Grand juries](#)

**Grand Jury** 🔑 [Constitutional and statutory provisions](#)

Missouri statute prohibiting disclosure of evidence and witness names revealed during grand jury proceeding served compelling state interest of preserving confidentiality of grand jury proceedings, and thus statute was not an unconstitutional restriction of free speech as applied to grand juror; allowing juror to reveal information she gained during grand jury service, including names of people not indicted, would

have undermined proper functioning of grand jury system, which depended upon the secrecy of grand jury proceedings, and juror freely undertook oath of secrecy regarding her service on grand jury, by which she agreed to surrender her First Amendment right to reveal details of her service. [U.S. Const. Amend. 1](#); [Mo. Ann. Stat. §§ 540.080, 540.320](#).

**[11] Constitutional Law** 🔑 Viewpoint or idea discrimination

**Constitutional Law** 🔑 Content-Based Regulations or Restrictions

Under the Free Speech Clause, a government, including a municipal government vested with state authority, has no power to restrict expression because of its message, its ideas, its subject matter, or its content. [U.S. Const. Amend. 1](#).

**[12] Constitutional Law** 🔑 Content-Based Regulations or Restrictions

**Constitutional Law** 🔑 Strict or exacting scrutiny; compelling interest test

Content-based laws, i.e., those that target speech based on its communicative content, are presumptively unconstitutional under the First Amendment and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests. [U.S. Const. Amend. 1](#).

**[13] Constitutional Law** 🔑 Content-Based Regulations or Restrictions

Government regulation of speech is content-based, and thus presumptively unconstitutional under the First Amendment, if a law applies to particular speech because of the topic discussed or the idea or message expressed; this commonsense meaning of the phrase “content based” requires a court to consider whether a regulation of speech on its face draws distinctions based on the message a speaker conveys. [U.S. Const. Amend. 1](#).

**[14] Constitutional Law** 🔑 Content-Based Regulations or Restrictions

Statute regulating speech is content-based, and thus presumptively unconstitutional under the First Amendment, if it requires enforcement authorities to examine the content of the message that is conveyed to determine whether a violation has occurred. [U.S. Const. Amend. 1](#).

**[15] Constitutional Law** 🔑 Particular Issues and Applications

**Grand Jury** 🔑 Conduct of proceedings in general

**Grand Jury** 🔑 Secrecy as to Proceedings

There are compelling state interests in favor of preserving the secrecy of grand jury proceedings; however, grand juries are also expected to operate within the limits of the First Amendment, as well as other provisions of the Constitution. [U.S. Const. Amend. 1](#).

**Attorneys and Law Firms**

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**MEMORANDUM AND ORDER**

[RODNEY W. SIPPEL](#), UNITED STATES DISTRICT JUDGE

\***969** Plaintiff Grand Juror Doe (Juror)<sup>2</sup> seeks a declaratory judgment that Missouri laws criminalizing Juror's disclosure

of information about her experience as a juror on a State of Missouri grand jury are unconstitutional as applied. Juror alleges that if these Missouri statutes are enforced it will violate her free speech rights under the First Amendment to the United States Constitution. Defendant St. Louis County Prosecuting Attorney has moved to dismiss the complaint on numerous grounds. Because the complaint fails to state a claim I will grant the motion to dismiss.

### **Background**

Plaintiff Juror began serving as a grand juror for the Circuit Court of St. Louis County on May 7, 2014. That grand jury's term of service was originally set to expire on September 10, 2014. On August 9, 2014, while on duty as a police officer for the City of Ferguson, Officer Darren Wilson shot and killed Michael Brown. Robert McCulloch, the Prosecuting Attorney for St. Louis County at the time, presented the matter to the grand jury to decide whether there was probable cause to believe Officer Wilson violated any Missouri state criminal laws in the death of Mr. Brown. The St. Louis County Circuit Court extended the term of the grand jury from September 10, 2014 to January 7, 2015 to allow the grand jury to consider the Wilson matter.

The Prosecuting Attorney's staff presented evidence regarding the case to the grand jury over a several week period. On November 24, 2014, upon completion of their investigation of the Wilson matter, the grand jury returned a "no true bill" declining to indict Officer Wilson. During his announcement of the grand jury's decision, McCulloch made public statements at a press conference about the jury's investigation and its decision not to issue an indictment. McCulloch also released evidence presented to the grand jury, including transcripts, reports, interviews, and forensic evidence. However, the transcripts and documents were redacted in a manner to keep secret the identities of the grand jurors, witnesses, and other persons connected to the investigation. In addition, McCulloch did not release the votes or deliberations of the grand jury.

Plaintiff Juror's complaint alleges that, from her perspective, the Prosecuting Attorney's presentation of the evidence in the Wilson matter to the grand jury was markedly different from "hundreds of matters presented to the grand jury earlier in its term." Juror alleges that the "State's counsel" to the grand jury "differed markedly and in significant ways from the State's counsel" in hundreds of previous matters; the investigation had a stronger emphasis on the victim than in other cases; and,

the "presentation of the law to which the grand jurors were to apply the facts was made in a muddled and untimely manner."

Juror alleges that McCulloch's statements at the press conference "characterizes the views of the grand jury collectively toward the evidence, witnesses, and the law, in a manner that does not comport with [Juror's] own opinions."

Juror now wants to speak out about her experience as a grand juror and to express opinions about the evidence and the investigation in the Wilson matter in particular, and about other grand jury cases generally for the purpose of comparison. Juror wants to comment on whether McCulloch's release of records and statements at the press conference accurately reflected the grand jurors' views of the evidence and \*970 witnesses in the Wilson matter. Juror also wants to express the view that the evidence and law were presented differently in the Wilson matter than Juror had experienced in other cases presented to the grand jury. Juror asserts that her motivation behind these proposed disclosures is to "aid in educating the public about how grand juries function" and to use Juror's "own experiences to advocate for legislative change to the way grand juries are conducted in Missouri."

Juror alleges that four State of Missouri statutes have a "chilling effect" which imposes a limitation on her speech. The statutes cited by Juror are [Missouri Revised Statutes sections 540.080, 540.120, 540.310, and 540.320](#). Juror seeks a declaratory judgment that "Missouri laws criminalizing speech by [Juror], about [Juror's] experiences as a state grand juror for the investigation of the [Wilson matter], are unconstitutional as applied." Juror asserts that her free speech rights under the First Amendment to the United States Constitution override the oath of secrecy she took as a grand juror, and, as a result, void any Missouri state statute which would criminalize Juror's proposed speech regarding the grand jury's proceedings.

The Prosecuting Attorney moved to dismiss the complaint on several grounds, including the doctrine of abstention. I granted the motion to abstain to allow Juror to seek relief in state court on state law grounds to avoid the necessity of ruling her federal First Amendment claim.<sup>3</sup> This case was stayed until Juror resolved her state law claims.

Juror subsequently filed a lawsuit in the St. Louis County Circuit Court seeking declaratory and injunctive relief which the circuit court denied. [Doc. # 8, Ex. A, [Grand Juror Doe v. McCulloch](#), No. 15SL-CC01891, 2016 WL 9000971 (Mo.

Cir. Ct. December 13, 2016) ] Juror's state court petition alleged three counts. [Doc. # 89, Ex. A, Pl.'s Pet.] In Count I, she alleged a claim under the First Amendment of the United States Constitution, the same cause of action she asserted in this Court. In Count II, Juror sought a declaration that § 540.320 R.S.Mo.,<sup>4</sup> (a statute that bars grand jurors from revealing evidence presented to the grand jury or the name of any witness who appeared before them), was no longer applicable or valid as applied to Juror. In Count III, Juror sought a court order declaring that Juror is relieved from the oath she took, under § 540.080 R.S.Mo., to keep the grand jury proceedings secret. Juror expressly stated in the petition that she did not want the state court to rule her First Amendment claim and that she was reserving that claim in the event she returned to federal court. Juror reserved her First Amendment claim under an [England](#) reservation. [England v. Louisiana State Board of Medical Examiners](#), 375 U.S. 411, 421-422, 84 S.Ct. 461, 11 L.Ed.2d 440 (1964) (allowing a federal claim to be held in abeyance and \*971 reserved for future litigation in federal court after a state court has resolved state law claims).

In her state court petition Juror asserted that her speech regarding her experiences and opinions about her grand jury service was chilled by three Missouri statutes.<sup>5</sup> She alleged that the three statutes, [sections 540.080, 540.310 and 540.320 of the Missouri Revised Statutes](#), are statutes that the Prosecuting Attorney enforced. The circuit court ruled that a declaratory judgment forbidding the Prosecuting Attorney from enforcing § 540.080 (the oath of secrecy the grand jurors take)<sup>6</sup> and § 540.310 (a statute providing that no grand juror be obliged or allowed to declare how grand jurors voted or what opinions were expressed by any grand juror about the issues before them)<sup>7</sup> would be have no practical effect because the Prosecuting Attorney cannot bring criminal charges for a violation of those statutes. The circuit court concluded that any claim for relief under those statutes must be addressed to the St. Louis County Circuit Court which has the inherent power to punish for contempt and to try contempt-of-court cases. [Doc. # 8, Ex. A, [Grand Juror Doe v. McCulloch](#), No. 15SL-CC01891 at 6.] Moreover, the circuit court found that Juror's desire to reveal her experiences as a grand juror, including how she voted or what she said or discussed during jury deliberations, did not fall within any exception to the long tradition of grand jury secrecy.<sup>8</sup> Juror contended that the Prosecuting Attorney's disclosure of some grand jury information freed from her oath of secrecy. The circuit court found that the release of

some grand jury information did not “necessarily require the release of everything.” [\[Id. at 10\]](#) The circuit court stated that “[c]omplete transparency is an anathema to the very nature of a grand jury, which depends upon secrecy and anonymity for its proper functioning.” [\[Id.\]](#) The circuit court concluded that Juror was not entitled to a declaratory judgment that § 540.320 was no longer applicable or valid as applied to Juror.

Because the basis of Juror's claims in her petition was the “chilling effect” on her speech imposed by Missouri law, the circuit \*972 court addressed her claim as a violation of the free speech guarantee of [Article I, § 8 of the Missouri Constitution](#). The circuit court also considered this claim in light of the First Amendment of the United States Constitution because [Article 1, § 8](#) has been found to be comparable to the First Amendment. [\[Id. at 11\]](#) In its free speech analysis, the circuit court stated that the grand jury system was “deeply rooted in federal and state courts [ ] and that the First Amendment has never been found to permit grand jurors to disclose information learned in the course of their grand jury service.” [\[Id. at 12\]](#). The circuit court noted that “grand jury secrecy is intended to protect the public welfare.” [\[Id. at 10\]](#). The circuit court found that Juror's grounds for relief did not fall under a statutory exception that allows the disclosure of grand jury materials when required by the public interest or in the protection of private rights.<sup>9</sup> [\[Id.\]](#) As a result, the circuit court rejected Juror's claims for relief based on both the Missouri Constitution and on the First Amendment.

The Missouri Court of Appeals affirmed the circuit court's decision. [Doc. # 89, Ex. B. [Grand Juror Doe v. McCulloch](#), 542 S.W.3d 354 (Mo. Ct. App. 2017) ] The court of appeals held that any declaratory or injunctive relief preventing the Prosecuting Attorney from enforcing §§ 540.080 and 540.310 should be denied because they would not have a conclusive effect. Despite an injunction against the Prosecuting Attorney regarding these statutes, the St. Louis County Circuit Court could enforce any violation of the statutes through contempt proceedings. In addition, the court of appeals found that Juror waived her right to preserve her First Amendment claim under [England](#) because her claim under [Article I, § 8 of the Missouri Constitution](#) Article by necessity encompassed her claim under the First Amendment. The court of appeals found that the circuit court properly analyzed Juror's grounds for relief and affirmed the dismissal of Juror's lawsuit.

At the conclusion of the state court litigation, Juror returned to this Court and sought to reopen her case for the resolution of her First Amendment claim. The Prosecuting Attorney

argued that this case should not be reopened because the state courts appropriately reached the First Amendment issue and that their rulings should be given preclusive effect under the Full Faith and Credit Clause, 28 U.S.C. § 1738. Because nothing in the record in the present case indicated that Juror broadened the scope of her state law claims to include the First Amendment claim she reserved in this Court, I granted Juror's motion to reopen this matter.

Subsequently, the Prosecuting Attorney filed an amended motion to dismiss. The Prosecuting Attorney moves to dismiss based on: (1) the preclusive effect of the state courts' proceedings; (2) lack of Juror's standing to sue for relief; (3) Juror's claim is not ripe; (4) sovereign immunity; and (5) failure to state a right under the First Amendment.

#### *Full Faith and Credit*

I have already rejected the assertion that Juror's First Amendment claim is precluded in my ruling of Juror's motion to reopen. See [Grand Juror Doe v. McCulloch](#), 4:15 CV 6 RWS (Doc. # 67 filed April 16, 2018). Juror preserved her [England](#) motion and, as a result, the state courts' proceedings do not preclude her First Amendment claim in this Court.

#### *Standing*

[1] [2] The Prosecuting Attorney argues that Juror does not have standing to assert her First Amendment claim. A plaintiff establishes Article III standing by showing \*973 that: (1) she has suffered an injury in fact that is actual or imminent; (2) the injury is fairly traceable to the challenged action of the defendant and not the result of some independent action of a third party not before the court; and (3) it is likely that the injury will be redressed by a favorable decision. [Lujan v. Defenders of Wildlife](#), 504 U.S. 555, 560–561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) (internal quotations and citation omitted) Juror seeks a declaratory judgment that four Missouri statutes, §§ 540.080, 540.120, 540.310, and 540.320 chill her right to free speech under the First Amendment. The Prosecuting Attorney asserts that any injuries stemming from three of these statutes, §§ 540.080, 540.120, 540.310, cannot be redressed through the granting of an injunction. I agree. Section 540.120 does not apply to Juror, it only prevents witnesses who appeared before the grand jury from violating an oath of secrecy imposed by § 540.110. Neither § 540.080 (the grand juror oath of secrecy) nor § 540.310 (jurors not allowed to reveal how any member of grand jury voted on any question or opinions expressed on any question) provide for criminal penalties. As a result, they are not enforceable by

the Prosecuting Attorney acting unilaterally. To the contrary, the authority to enforce these statutes lies with the St. Louis County Circuit Court through its powers of contempt. See Doc. # 89, Ex. B. [Grand Juror Doe v. McCulloch](#), 542 S.W.3d at 359–360. Any declaration or injunctive relief issued by the Court against the Prosecuting Attorney would not resolve the potential injury Juror faces from state court contempt proceedings. See [Simon v. E. Kentucky Welfare Rights Org.](#), 426 U.S. 26, 41–42, 96 S.Ct. 1917, 48 L.Ed.2d 450 (1976) (“[A] federal court [can] act only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court.”). As a result, an injunction as to these three statutes is not a definitive and appropriate form of relief.

[3] [4] The Prosecuting Attorney also argues that Juror does not have standing to seek injunctive relief for her First Amendment claim challenging the enforcement of § 540.320 (the disclosure of evidence and witness names revealed during the grand jury proceeding). This statute does make its violation a class A misdemeanor which is enforced by Prosecuting Attorney. To establish standing “a party need not expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights [but] he must show that his injury is more than imaginary or speculative. [Missouri Roundtable for Life v. Carnahan](#), 676 F.3d 665, 672 (8th Cir. 2012) (internal quotations and citations omitted). There is not any evidence before me that a grand juror has ever violated § 540.320, nevertheless not been prosecuted for such a violation. Juror's fear of prosecution is not speculative or imaginary, especially in light of the possibility of being held in contempt in addition to being subject to criminal prosecution. (This possibility is especially heightened by the fact that her lawsuit for injunctive relief in state court was dismissed.) As a result, Juror has standing to bring this claim.

#### *Ripeness*

[5] [6] The Prosecuting Attorney asserts that Juror's claim under for injunctive relief is not ripe. In assessing ripeness, a court focuses on whether a case involves “contingent future events that may not occur as anticipated, or indeed may not occur at all,” [Missouri Roundtable for Life](#), 676 F.3d at 674 (internal quotation and citation omitted). The Prosecuting Attorney argues that Juror's claim is not ripe because she has not alleged that she \*974 plans to disclose evidence or witnesses that have not been previously disclosed. However, § 540.320 does not state that Juror is free to confirm that

any previously disclosed evidence or witness name is correct. Moreover, in her complaint Juror asserts that she would like to reveal her opinions about the evidence and the investigation of the Wilson matter. She also asserts that she wants to express her opinion how the evidence in the Wilson matter was presented differently than in hundreds of other grand jury matters. Such opinions by necessity would imply that Juror would reveal evidence beyond that revealed by McCulloch as well as revealing evidence in hundreds of other grand jury proceedings. Juror has asserted sufficient facts in her complaint to establish that her claim is ripe.

#### *Eleventh Amendment*

[7] [8] [9] The Prosecuting Attorney asserts that Juror's claims are barred by the Eleventh Amendment to the United States Constitution. The Eleventh Amendment bars suits in federal court against a state by its own citizens. [Board of Trustees of University of Alabama v. Garrett](#), 531 U.S. 356, 363, 121 S.Ct. 955, 148 L.Ed.2d 866 (2001). Eleventh Amendment immunity extends to state agencies which are considered an arm of the State. [Gibson v. Arkansas Dept. of Correction](#), 265 F.3d 718, 720 (8th Cir. 2001). A suit against a state employee in his official capacity is a suit against the State of Missouri. [Egerdahl v. Hibbing Community College](#), 72 F.3d 615, 619 (8th Cir.1995).

The Prosecuting Attorney argues a county prosecutor is acting as an officer of the state when conducting criminal prosecutions of state law. [State ex rel. Jackson Cty. Prosecuting Attorney v. Prokes](#), 363 S.W.3d 71, 85 (Mo. Ct. App. 2011) (“a prosecuting attorney in a criminal case acts as a quasi-judicial officer representing the people of the State.”). The Prosecuting Attorney asserts that because Juror has not alleged sufficient facts to show that she is imminently likely to be prosecuted if she breaks her vow of secrecy, the Eleventh Amendment bars jurisdiction in federal court. [Care Comm. v. Arneson](#), 766 F.3d 774, 797 (8th Cir. 2014) (“[a]bsent a real likelihood that [a] state official will employ his supervisory powers against plaintiffs' interests, the Eleventh Amendment bars federal court jurisdiction.”)

Juror counters that the Prosecuting Attorney is an employee of St. Louis County, a municipality, and cannot invoke Eleventh Amendment immunity. [Pennhurst State Sch. & Hosp. v. Halderman](#), 465 U.S. 89, 124 n.34, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984) (“the Eleventh Amendment does not apply to counties and similar municipal corporations.”) (internal quotations omitted). Juror argues that even if the Prosecuting Attorney is deemed a state actor, Eleventh Amendment

immunity would not apply because Juror seeks prospective relief. [Missouri Prot. & Advocacy Servs., Inc. v. Carnahan](#), 499 F.3d 803, 807 (8th Cir. 2007) (“A State's Eleventh Amendment immunity does not bar a suit against a state official to enjoin enforcement of an allegedly unconstitutional statute, provided that such officer [has] some connection with the enforcement of the act.”) (internal quotations and citations omitted). Assuming that the Prosecuting Attorney is a state actor, Juror may still obtain the injunctive relief of barring the Prosecuting Attorney from enforcing § 540.320. Because Juror has alleged her speech is chilled by that statute and there is no indication that the Prosecuting Attorney would not pursue prosecuting Juror for disclosing grand jury proceedings evidence and witnesses, I find that Juror's First Amendment claim is not barred by the Eleventh Amendment.

#### *First Amendment Claim*

[10] [11] [12] [13] [14] Juror seeks a declaratory judgment that Missouri laws criminalizing \*975 her speech about her experience as a state grand juror are unconstitutional as applied to Juror. She moves to enjoin the Prosecuting Attorney from enforcing those laws. Juror argues that the threat she may be prosecuted for revealing information she obtained while serving as a grand juror imposes an unconstitutional burden on her free speech rights under the First Amendment.

The First Amendment, applicable to the States through the Fourteenth Amendment, prohibits the enactment of “laws abridging the freedom of speech.” U.S. Const., Amdt. 1. Under that Clause, a government, including a municipal government vested with state authority, has no power to restrict expression because of its message, its ideas, its subject matter, or its content. Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.

Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed. This commonsense meaning of the phrase “content based” requires a court to consider whether a regulation of speech “on its face” draws distinctions based on the message a speaker conveys. [Reed v. Town of Gilbert, Ariz.](#), — U.S. —, 135 S.Ct. 2218, 2226–27, 192 L.Ed.2d 236 (2015) (internal quotations and citations omitted). Furthermore, a statute regulating speech is content based if it requires “enforcement authorities to

examine the content of the message that is conveyed to determine whether a violation has occurred.” [McCullen v. Coakley](#), 573 U.S. 464, 134 S.Ct. 2518, 2531, 189 L.Ed.2d 502 (2014) (internal quotations and citations omitted). Because a purported violation of § 540.320 by Juror would necessarily require the Prosecuting Attorney to examine the content of Juror's speech, the statute is content based.<sup>10</sup> Accordingly, a balance must be struck between Juror's First Amendment rights and Missouri's interest in preserving the confidentiality of its grand jury proceedings. See [Butterworth v. Smith](#), 494 U.S. 624, 631, 110 S.Ct. 1376, 108 L.Ed.2d 572 (1990)

On the one hand, conducting grand jury proceedings in secret is a longstanding and important tradition in the American criminal justice system. On the other hand, free speech is a fundamental right expressly preserved by the First Amendment. As fundamental a right as free speech is, however, it is not unlimited and unqualified. The United States Supreme Court has observed that “[t]he societal value of speech must, on occasion, be subordinated to other values and considerations.” [Dennis v. United States](#), 341 U.S. 494, 503-504, 71 S.Ct. 857, 95 L.Ed. 1137 (1951).

#### *The tradition of grand jury secrecy*

The use of grand juries has been a part of American law since the founding of our country. The United States Supreme Court has noted that:

The grand jury has always occupied a high place as an instrument of justice in our system of criminal law—so much so that it is enshrined in the Constitution. It serves the dual function of determining if there is probable cause to believe that a crime has been committed and of protecting citizens against unfounded criminal prosecutions. It has always been extended extraordinary powers of \*976 investigation and great responsibility for directing its own efforts...

These broad powers are necessary to permit the grand jury to carry out both parts of its dual function. Without thorough and effective investigation, the grand jury would be unable either to ferret out crimes deserving of prosecution, or to screen out charges not warranting prosecution.

The same concern for the grand jury's dual function underlies the long-established policy that maintains the

*secrecy* of the grand jury proceedings in the federal courts ...

Grand jury *secrecy*, then, is as important for the protection of the innocent as for the pursuit of the guilty. Both Congress and this Court have consistently stood ready to defend it against unwarranted intrusion. In the absence of a clear indication in a statute or Rule, we must always be reluctant to conclude that a breach of this *secrecy* has been authorized.

[United States v. Sells Engineering, Inc.](#), 463 U.S. 418, 423-425, 103 S.Ct. 3133, 77 L.Ed.2d 743 (1983) (emphasis added) (internal quotations and citation omitted).

The United States Supreme Court has also recognized that the secrecy of grand jury proceedings serves as an important governmental interest.

We consistently have recognized that the proper functioning of our grand jury system depends upon the *secrecy* of grand jury proceedings. In particular, we have noted several distinct interests served by safeguarding the *confidentiality* of grand jury proceedings. First, if preindictment proceedings were made public, many prospective witnesses would be hesitant to come forward voluntarily, knowing that those against whom they testify would be aware of that testimony. Moreover, witnesses who appeared before the grand jury would be less likely to testify fully and frankly, as they would be open to retribution as well as to inducements. There also would be the risk that those about to be indicted would flee, or would try to influence individual grand jurors to vote against indictment. Finally, by preserving the *secrecy* of the proceedings, we assure that persons who are accused but exonerated by the grand jury will not be held up to public ridicule.”

[Douglas Oil Co. v. Petrol Stops Northwest](#), 441 U.S. 211, 218–219, 99 S.Ct. 1667, 60 L.Ed.2d 156 (1979) (emphasis added) (footnotes and citation omitted).

[15] As the Court in [Douglas](#) confirmed, it is well established that there are compelling state interests in favor of preserving the secrecy of grand jury proceedings. However, grand juries are also expected to “operate within the limits of the First Amendment, as well as other provisions of the Constitution.” [Butterworth](#), 494 U.S. at 631, 110 S.Ct. 1376 (internal quotation and citation omitted).

Juror cites to the [Butterworth](#) case in her complaint and relies on it in her opposition to the motion to dismiss. However, the free speech rights at issue in this case are very different than those in [Butterworth](#). In that case a grand jury was investigating alleged improprieties committed by county officials in Florida. A newspaper reporter had obtained information about the alleged improprieties while writing a series of newspaper articles. The reporter was called to testify before the grand jury. After the grand jury investigation was terminated, the reporter wanted to publish a news story and possibly a book about the subject matter of the investigation which would include his own testimony before the grand jury.<sup>11</sup> A Florida statute barred \*977 grand jury witnesses from disclosing their testimony before the grand jury (with certain exceptions not applicable to the case). A violation of the statute was a misdemeanor in the first degree. The reporter sought a declaratory judgment that the statute unconstitutionally abridged his speech and sought to enjoin the State from prosecuting him. The Supreme Court held that “insofar as the Florida law prohibits a grand jury witness from disclosing *his own testimony after the term of the grand jury has ended*, it violates the First Amendment to the United States Constitution.” *Id.* at 626, 110 S.Ct. 1376. (emphasis added). However, the decision turned on a very specific aspect of the case. The Court stated that it was dealing “only with respondent’s right to divulge information of which *he was in possession before he testified* before the grand jury, and *not information which he may have obtained as a result of his participation in the proceedings of the grand jury.*” *Id.* at 632, 110 S.Ct. 1376 (emphasis added).

Unlike the grand juror witness in [Butterworth](#), the speech Juror wants to disseminate is not limited to information Juror possessed before her grand jury service. Juror wants to speak out about her experience as a grand juror. She wants to express her opinions about the evidence and the investigation in the Wilson matter in particular and about hundreds of other grand jury cases generally for the purpose of comparison. Juror seeks to comment on whether McCulloch’s release of records and statements at the press conference accurately reflected the grand jurors’ views of the evidence and witnesses in the Wilson matter. Juror also wants to express the view that the evidence and law were presented differently in the Wilson matter than Juror had experienced in other matters presented to the grand jury. Juror asserts that her motivation behind these proposed disclosures is to “aid in educating the public about how grand juries function” and to use Juror’s “own experiences to advocate for legislative change to the way grand juries are conducted in Missouri.”

Allowing Juror to reveal the information she gained during her grand jury service would be undermine the proper functioning of the Missouri grand jury system which depends upon the secrecy of grand jury proceedings. If Juror is allowed to reveal the votes or opinions expressed by other grand jurors in the Wilson matter, her views may be subject to debate. Other grand jurors on the Wilson panel may disagree with Juror’s representations. They would be forced into a dilemma between revealing their identity to publically challenge Juror’s representations or to remain anonymous (as they were promised) and let Juror’s unfounded representations go unchallenged. Juror’s request is not limited to the Wilson matter. She may reveal the votes and opinions of her fellow grand jurors in hundreds of other matters in order to make a comparison to the Wilson matter. Juror also seeks to disclose the evidence, and how it was presented, in the Wilson matter in comparison to the other matters presented to the grand jury.

Moreover, Juror does not set any limit to her request. She would be free to reveal the names of the other grand jurors on her panel and the names of witnesses not only from Wilson matter but from hundreds of other grand jury matters. The revelation of witness names and the identity of the grand jury members may subject these citizens to the very dangers the tradition \*978 of secrecy is in place to prevent. If the names of witnesses and grand jurors are allowed to be revealed after the grand jury’s term is complete, many witnesses would be hesitant to testify candidly and jurors would be reluctant to deliberate openly for fear of retribution by the targets of the investigation or by the public at large.

Juror may also reveal the names of people who were not indicted which defeats a fundamental reason for the secrecy of grand jury proceedings. All of these concerns impose on the rights of those involved in grand jury proceedings and can be can be protected by maintaining the secrecy of the proceedings.

*Grand jurors take an oath as members of the grand jury to keep grand jury proceedings secret*

All grand jury members take an oath of secrecy regarding their service on a grand jury. That oath is found in [section 540.080 R.S.Mo.](#) which states:

Grand jurors may be sworn in the following form:

“Do you solemnly swear you will diligently inquire and true presentment make, according to your charge, of all

offenses against the laws of the state committed or triable in this county of which you have or can obtain legal evidence; the counsel of your state, your fellows and your own, you shall truly keep secret? You further swear that you will present no one for any hatred, malice or ill will; neither will you leave unrepresented any one for love, fear, favor or affection, or for any reward or the hope or promise thereof, but that you will present things truly as they come to your knowledge, to the best of your understanding, according to the laws of this state, so help you God.”

A St. Louis County Circuit judge required the grand jurors in this case to take the oath twice – both at the beginning of their service and again when the grand jury's term was extended.<sup>12</sup>

Juror freely undertook this oath to keep the information she gained as a grand juror secret. By taking this oath she agreed to surrender her First Amendment right to reveal the details of her grand jury service. Juror can keep her oath and still pursue her goal to educate the public about how grand juries function and to advocate for legislative change to the way grand juries are conducted in Missouri.

**Conclusion**

The evidence presented to a grand jury, the witness names, the grand juror names, and the way a prosecutor presents her evidence are all types of information that are obtained

as a result of a grand juror's participation in the proceedings of the grand jury. The balancing of Juror's desire to reveal this information and Missouri's interest in preserving the confidentiality of its grand jury proceedings weighs in favor of Missouri's interest. Missouri has a compelling governmental interest in keeping this information secret. The imposition of secrecy is narrowly tailored to serve Missouri's compelling interest in the confidentiality of its grand jury proceedings.

Accordingly,

**IT IS HEREBY ORDERED** that Defendant Prosecuting Attorney's motion to dismiss [79] is **GRANTED**.

**IT IS FURTHER ORDERED** that Plaintiff Grand Juror Doe's motion for referral to mediation [91] is **DENIED**.

**IT IS FURTHER ORDERED** that Plaintiff Grand Juror Doe's motion to substitute Wesley J. C. Bell for Defendant Robert P. McCulloch in his official capacity \*979 as Prosecution Attorney for St. Louis County [93] is **GRANTED**.

**All Citations**

367 F.Supp.3d 966

**Footnotes**

- 1 This case was originally filed against Robert P. McCulloch in his official capacity as the Prosecuting Attorney of St. Louis County, Missouri. Wesley J. C. Bell recently succeeded Mr. McCulloch as the Prosecuting Attorney of St. Louis County, Missouri. All of the briefs in this matter were filed before Mr. Bell took office. As a result, this order will use the term Prosecuting Attorney as the defendant in this action.
- 2 Plaintiff in this matter has been given permission to proceed under an alias in order to preserve anonymity. I will refer to Juror by the pronouns she and her although whether Juror is male or female is not known.
- 3 [Burford v. Sun Oil Co.](#), 319 U.S. 315, 333 n.29, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943) (“It is particularly desirable to decline to exercise equity jurisdiction when the result is to permit a State court to have an opportunity to determine questions of State law which may prevent the necessity of decision on a constitutional question.”).
- 4 That section states that:  
No grand juror shall disclose any evidence given before the grand jury, nor the name of any witness who appeared before them, except when lawfully required to testify as a witness in relation thereto; nor shall he disclose the fact of any indictment having been found against any person for a felony, not in actual confinement, until the defendant shall have been arrested thereon. Any juror violating the provisions of this section shall be deemed guilty of a class A misdemeanor.  
[§ 540.320 R.S.Mo.](#)
- 5 Juror did not challenge [§ 540.120 R.S. Mo.](#) in her state court petition.
- 6 This statute provides the oath taken by grand jurors as follows:  
Grand jurors may be sworn in the following form:

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Do you solemnly swear you will diligently inquire and true presentment make, according to your charge, of all offenses against the laws of the state committed or triable in this county of which you have or can obtain legal evidence; the counsel of your state, your fellows and your own, you shall truly keep secret? You further swear that you will present no one for any hatred, malice or ill will; neither will you leave unrepresented any one for love, fear, favor or affection, or for any reward or the hope or promise thereof, but that you will present things truly as they come to your knowledge, to the best of your understanding, according to the laws of this state, so help you God.

[§ 540.080 R.S.Mo.](#)

7 This statute provides:

No member of a grand jury shall be obliged or allowed to testify or declare in what manner he or any other member of the grand jury voted on any question before them, or what opinions were expressed by any juror in relation to any such question.

[§ 540.310 R.S.Mo.](#)

8 One exception is found in [§ 540.300 R.S.Mo.](#):

Members of the grand jury may be required by any court to testify whether the testimony of a witness examined before such jury is consistent with or different from the evidence given by such witness before such court. They may also be required to disclose the testimony given before them by any person, upon a complaint against such person for perjury, or upon his trial for such offense.

9 See [§ 540.300 R.S.Mo.](#) supra.

10 In my first order dismissing this matter [Doc # 44] I opined that a grand juror's oath of secrecy is not a prohibition of speech based on content. Upon further reflection, Missouri's statute [§ 540.320](#) is based on content.

11 The witness had also sought to divulge his "experience" before the grand jury. The Court declined to address this undefined request because the lower court's holding was limited to the issue of "testimony before the grand jury". [Butterworth, 494 U.S. at 629, n.2, 110 S.Ct. 1376](#) (internal quotation omitted).

12 On May 7, 2014 and on September 10, 2014.

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969 F.3d 883  
United States Court of Appeals, Eighth Circuit.

Grand Juror DOE Plaintiff - Appellant

v.

Wesley Jonell-Cleavon BELL,<sup>1</sup> in  
his official capacity as Prosecuting  
Attorney for St. Louis County,  
Missouri Defendant - Appellee

No. 19-1436

Submitted: March 12, 2020

Filed: August 14, 2020

**Synopsis**

**Background:** Grand juror who served on grand jury that decided not to charge police officer who fatally shot a Black youth brought action under § 1983, asserting that Missouri's grand jury secrecy laws violated her First Amendment rights. The United States District Court for the Eastern District of Missouri, [Rodney W. Sippel](#), Chief Judge, granted the defendant's motion to dismiss for failure to state cause of action, and plaintiff appealed.

**Holdings:** The Court of Appeals, [Gruender](#), Circuit Judge, held that:

[1] Missouri's grand jury secrecy laws did not violate the free speech rights of grand juror who served on grand jury that decided not to charge police officer who fatally shot a Black youth, even assuming that the laws were content-based restrictions on speech, and

[2] law continued to be narrowly tailored to serve a compelling State interest, even after prosecutor took the "extraordinary" step of releasing evidence and other information concerning the proceedings of grand jury.

Affirmed.

West Headnotes (18)

[1] **Federal Courts** ⚡ **Pleading**

Court of Appeals reviews de novo a district court's grant of motion to dismiss for failure to state claim. [Fed. R. Civ. P. 12\(b\)\(6\)](#).

[2] **Constitutional Law** ⚡ **First Amendment**

First Amendment prohibition against the enactment of laws abridging freedom of speech is made applicable to the States via the Fourteenth Amendment. [U.S. Const. Amends. 1, 14](#).

[3] **Constitutional Law** ⚡ **Grand juries**

While the States traditionally have had broad powers to limit grand jury speech, grand juries are expected to operate within the limits of the First Amendment, as well as the other provisions of the Constitution. [U.S. Const. Amend. 1](#).

[4] **Constitutional Law** ⚡ **Purpose of constitutional protection**

**Constitutional Law** ⚡ **Judicial Proceedings**

Major purpose of the First Amendment is to protect the free discussion of governmental affairs, including the operations of the courts. [U.S. Const. Amend. 1](#).

[5] **Grand Jury** ⚡ **Constitutional and statutory provisions**

Fact that a law advances the functioning of the grand jury is not some talisman that dissolves all Constitutional protections, but must instead be justified by reference to the dictates of the Constitution.

[6] **Constitutional Law** ⚡ **Viewpoint or idea discrimination**

**Constitutional Law** 🔑 Content-Based Regulations or Restrictions

Free Speech Clause of the First Amendment prohibits any governmental body from restricting expression because of its message, its ideas, its subject matter, or its content. *U.S. Const. Amend. 1.*

**[7]** **Constitutional Law** 🔑 Content-Based Regulations or Restrictions**Constitutional Law** 🔑 Strict or exacting scrutiny; compelling interest test

Content-based laws, i.e., those that target speech based on its communicative content, are presumptively unconstitutional and may be justified only if the State proves that they are narrowly tailored to serve compelling State interests. *U.S. Const. Amend. 1.*

**[8]** **Constitutional Law** 🔑 Content-Based Regulations or Restrictions

Law restricting speech is presumptively unconstitutional, as being “content-based,” if it requires enforcement authorities to examine the content of the message that is conveyed to determine whether a violation has occurred. *U.S. Const. Amend. 1.*

**[9]** **Constitutional Law** 🔑 Content-Based Regulations or Restrictions

In deciding how closely to scrutinize a restriction on speech, court must determine whether the statute draws distinctions based on message that speaker conveys. *U.S. Const. Amend. 1.*

**[10]** **Constitutional Law** 🔑 Strict or exacting scrutiny; compelling interest test

Strict scrutiny of content-based restriction on speech, for purpose of deciding whether the restriction violates the First Amendment, is best described as end-and-means test, and as a result, court must first have a clear understanding of what the State's interest may be before

deciding whether the purported interest is indeed a compelling state interest. *U.S. Const. Amend. 1.*

**[11]** **Constitutional Law** 🔑 Grand juries**Grand Jury** 🔑 Secrecy as to Proceedings

Missouri's grand jury secrecy laws did not violate the free speech rights of grand juror who served on grand jury that decided not to charge police officer who fatally shot a Black youth; even assuming that the laws were content-based restrictions on speech, they were narrowly tailored to serve compelling State interest in maintaining secrecy of grand jury proceedings, as integral component to functioning grand jury system. *U.S. Const. Amend. 1; Mo. Ann. Stat. §§ 540.080, 540.120, 540.310, 540.320.*

**[12]** **Constitutional Law** 🔑 Strict or exacting scrutiny; compelling interest test

Administration of justice is an interest of the highest order and an overriding State interest, the advancement of which may justify a content-based restriction on speech. *U.S. Const. Amend. 1.*

**[13]** **Grand Jury** 🔑 Secrecy as to Proceedings

Proper functioning of grand jury system depends upon the secrecy of grand jury proceedings.

**[14]** **Constitutional Law** 🔑 Grand juries**Grand Jury** 🔑 Secrecy as to Proceedings

Missouri statute that prohibited the disclosure of any evidence presented to grand jury or the names of witnesses who testified before grand jury, as applied to grand juror who served on grand jury that decided not to charge police officer who fatally shot a Black youth, continued to be narrowly tailored to serve a compelling State interest, and thus did not violate that grand juror's First Amendment rights, even after prosecutor took the “extraordinary” step of releasing evidence and other information

concerning the proceedings of the grand jury in manner which, according to the grand juror, mischaracterized views of grand jurors collectively toward the evidence and witnesses' credibility; statute continued to further the State's interest in protecting identity of witnesses and keeping confidential the specific information they provided to grand jury. [U.S. Const. Amend. 1](#); [Mo. Ann. Stat. § 540.320](#).

[15] **Constitutional Law** 🔑 Strict or exacting scrutiny; compelling interest test

**Constitutional Law** 🔑 Strict or exacting scrutiny; compelling interest test

For a statute to be “narrowly tailored” to serve a compelling State interest, and thus not violate the First Amendment even if it is a content-based restriction on speech, it must be the least restrictive means of serving the State's interest. [U.S. Const. Amend. 1](#).

[16] **Constitutional Law** 🔑 Narrow tailoring

“Narrowly tailored” regulation, for First Amendment purposes, is one that actually advances the State's interest, does not sweep too broadly, does not leave significant influences bearing on the interest unregulated, and could be replaced by no other regulation which could advance the interest as well with less infringement of speech. [U.S. Const. Amend. 1](#).

[17] **Constitutional Law** 🔑 Strict or exacting scrutiny; compelling interest test

Requirement that a content-based restriction on speech must be “narrowly tailored” to serve a compelling State interest means that the factual situation must demonstrate a real need for the government to act to protect its interests. [U.S. Const. Amend. 1](#).

[18] **Grand Jury** 🔑 In general; discretion

State does not forfeit its interest in maintaining the secrecy of all grand jury materials and

proceedings merely because it chooses to disclose some information.

\*885 Appeal from United States District Court for the Eastern District of Missouri - St. Louis

#### Attorneys and Law Firms

Grant R. Doty, Equal Employment Opportunity Commission, Andrew McNulty, Anthony E. Rother, Jessie M. Steffan, American Civil Liberties Union of Missouri Foundation, Joshua Michael Pierson, David Eric Sowers, Ferne Paula Wolf, Silverstein & Wolf, Saint Louis, MO, Gillian R. Wilcox, ACLU of Missouri Foundation, Kansas City, MO, for Plaintiff - Appellant.

Emily Ann Dodge, Attorney General's Office, Jefferson City, MO, for Defendant - Appellee.

Before [GRUENDER](#), [WOLLMAN](#), and [SHEPHERD](#), Circuit Judges.

#### Opinion

[GRUENDER](#), Circuit Judge.

Grand Juror Doe (“Doe”) appeals the district court's<sup>2</sup> dismissal of her action seeking both a declaration that the State of Missouri's grand jury secrecy laws are an unconstitutional abridgement of free speech as applied to her and an injunction preventing their enforcement.<sup>3</sup> For the reasons below, we affirm.

#### \*886 I.

On August 9, 2014, Darren Wilson, a former police officer with the City of Ferguson, Missouri, shot and killed Michael Brown. Following the shooting, St. Louis County Prosecuting Attorney Robert P. McCulloch announced that he intended to submit the matter to a grand jury for consideration. At the time, Doe was a grand juror serving in the circuit court for St. Louis County for a term originally scheduled to end on September 10, 2014. Following Brown's death, Doe's service was extended to January 2015, and the grand jury was tasked with investigating whether there was probable cause to believe Wilson committed a crime.

“In Missouri, grand jury proceedings are conducted in secret,” *State ex rel. Roe v. Goldman*, 471 S.W.3d 814, 817 (Mo. Ct. App. 2015), and the Wilson grand jury was no different. To impress upon Doe the significance of this confidentiality requirement, Missouri required Doe to take an oath of secrecy twice, once in May 2014 and a second time in September 2014, swearing in relevant part that she would “truly keep secret” “the counsel of [her] state, [her] fellows and [her] own.” Mo. Rev. Stat. § 540.080. Missouri law both protects grand jurors in their oath and prohibits them from violating it. On the one hand, no one may force a juror to disclose how she voted “on any question before [her]” or “what opinions were expressed by any juror in relation to any such question.” Mo. Rev. Stat. § 540.310. On the other hand, “no member of a grand jury” may “declare in what manner he or any other member of the grand jury voted,” *id.*, and “[n]o grand juror shall disclose any evidence given before the grand jury, nor the name of any witness who appeared before them, except when lawfully required to testify as a witness in relation thereto,” *id.* § 540.320. A grand juror who unlawfully discloses evidence or names of witnesses “shall be deemed guilty of a class A misdemeanor.” *Id.* Missouri also prohibits witnesses from violating the grand jury's secrecy. *See id.* §§ 540.110, 540.120.

On November 24, 2014, the Wilson grand jury returned a “no true bill,” and the jury was subsequently discharged. Immediately afterward, McCulloch held a press conference at which he delivered an oral statement and, in an unusual move, released some of the evidence and testimony presented to the grand jury, including transcripts, reports, interviews, and forensic evidence. The documents were redacted to keep secret the identities of the grand jurors, witnesses, and other persons connected to the investigation. The documents did not include any information concerning the grand jury's deliberations or any grand juror's vote on any charge.

Six weeks later, Doe sued McCulloch in his official capacity under 42 U.S.C. § 1983, seeking both declaratory and injunctive relief because, she claimed, sections 540.080, 540.120, 540.310, and 540.320 of the Missouri Revised Statutes violate the Free Speech Clause of the First Amendment as applied to her.<sup>4</sup> In her complaint, Doe alleged that she had not recounted her experience or expressed her views concerning the Wilson case on account of her fears that she will face criminal penalties or contempt charges. She asserted that McCulloch mischaracterized the views of the grand jurors collectively toward the evidence, the witnesses' credibility, and the law, and as a result, she sought to correct

the record. Doe also claimed that she would like to speak about the experience of \*887 being a grand juror, including the discrepancies she noticed in the procedures utilized by McCulloch in the Wilson case compared to others. Doe did not express a desire to discuss publicly the Wilson matter completely independently of her role as a grand juror, but instead she sought to pull back the curtain of the jury's secrecy to discuss a wide array of previously confidential matters that go to the heart of the grand jury's deliberations.

The district court initially granted Missouri's motion to dismiss under the abstention doctrine announced in *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941). *See Doe v. McCulloch*, 106 F. Supp. 3d 1007, 1014 (E.D. Mo. 2015). We vacated and remanded, holding that “the district court should not have dismissed the case outright, but rather should have stayed the case while the state-law issues were decided by the Missouri state courts.” *McCulloch*, 835 F.3d at 786. While her federal appeal was pending, Doe pursued state-law claims in Missouri courts, all of which were dismissed in 2016. *See Doe v. McCulloch*, No. 15SL-CC01891, 2016 WL 9000971, at \*1 (Mo. Cir. Ct. Dec. 13, 2016). The Missouri Court of Appeals affirmed the dismissal of Doe's state-law claims in 2017. *See Doe v. McCulloch*, 542 S.W.3d 354, 367 (Mo. Ct. App. 2017).

At the end of litigation in state court, the district court reopened this case. *Doe v. McCulloch*, No. 4:15 CV 6 RWS, 2018 WL 3725774, at \*2 (E.D. Mo. June 26, 2018). It then determined that Doe lacked standing to challenge section 540.120 because the statute applies only to witnesses that appear before a grand jury and thus did not apply to Doe. *Doe v. Bell*, 367 F. Supp. 3d 966, 973 (E.D. Mo. 2019). The district court also held that Doe lacked standing to challenge sections 540.080 and 540.310 because neither section provides for criminal penalties and thus were not enforceable by the prosecuting attorney but only by the appropriate Missouri circuit court, which was not a party to the action. As a result, the district court could not redress any injury that fairly could be traced to an action of a named defendant. *Id.* The court then granted Missouri's motion to dismiss Doe's federal constitutional claim concerning section 540.320, holding that Doe had failed to state a claim for which relief could be granted because the statute did not violate Doe's First Amendment free speech rights since it was narrowly tailored to serve a compelling governmental interest. *See id.* at 969, 978. Doe appeals.

## II.

On appeal, Doe argues that [section 540.320 of the Missouri Revised Statutes](#) is an unconstitutional abridgment of free speech as applied to her and thus that the district court erred in dismissing her challenge against this provision for failure to state a claim.<sup>5</sup> Missouri responds that (1) the First Amendment's Free Speech Clause does not afford Doe a right to speak about matters she learned of during her grand jury service; (2) even if the Free Speech Clause covers her proposed speech, Doe waived her rights when she swore an oath of secrecy; and (3) applying strict scrutiny, [section 540.320](#) is narrowly tailored to achieve a compelling governmental interest.

[1] We review *de novo* a district court's grant of a motion to dismiss for \*888 failure to state a claim. *Wong v. Minn. Dep't of Human Servs.*, 820 F.3d 922, 927 (8th Cir. 2016). Here, we need not settle whether Doe's proposed speech is covered by the First Amendment or whether Doe waived her speech rights by swearing an oath to keep grand jury matters secret. Because Missouri's grand jury secrecy laws survive even the most exacting scrutiny, Doe failed to state a claim for which relief can be granted.

[2] [3] [4] [5] The First Amendment prohibits the enactment of laws “abridging the freedom of speech.” U.S. Const. amend. I. “The Fourteenth Amendment makes th[is] prohibition applicable to the States.” *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 442, 135 S.Ct. 1656, 191 L.Ed.2d 570 (2015). The Supreme Court has previously explained that though states traditionally have had broad powers to limit grand jury speech, grand juries “are expected to operate within the limits of the First Amendment, as well as the other provisions of the Constitution.” *Butterworth v. Smith*, 494 U.S. 624, 630, 110 S.Ct. 1376, 108 L.Ed.2d 572 (1990) (internal quotation marks omitted). This is because “ ‘a major purpose’ ” of the First Amendment is “ ‘to protect the free discussion of governmental affairs,’ ” including the “operations of the courts.” *Landmark Commc'ns, Inc. v. Virginia*, 435 U.S. 829, 838-39, 98 S.Ct. 1535, 56 L.Ed.2d 1 (1978) (quoting *Mills v. Alabama*, 384 U.S. 214, 218, 86 S.Ct. 1434, 16 L.Ed.2d 484 (1966)). Accordingly, a state's argument that a law advances the functioning of the grand jury is not “some talisman that dissolves all constitutional protections” but must instead be justified by reference to the dictates of the Constitution. See *United States v. Dionisio*, 410 U.S. 1, 11, 93 S.Ct. 764, 35 L.Ed.2d 67 (1973).

[6] [7] [8] [9] The Free Speech Clause prohibits any governmental body from “restrict[ing] expression because of its message, its ideas, its subject matter, or its content.” *Reed v. Town of Gilbert*, 576 U.S. 155, 163, 135 S.Ct. 2218, 192 L.Ed.2d 236 (2015). “Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.” *Id.* A law is content based if it requires “enforcement authorities to examine the content of the message that is conveyed to determine whether a violation has occurred.” *McCullen v. Coakley*, 573 U.S. 464, 479, 134 S.Ct. 2518, 189 L.Ed.2d 502 (2014) (internal quotation marks omitted). Thus, in evaluating how closely to scrutinize a state restriction of speech, a court must determine whether a statute “draws distinctions based on the message a speaker conveys.” *Reed*, 576 U.S. at 163, 135 S.Ct. 2218.

The district court held that [section 540.320](#) imposes a content-based restriction because it regulates the specific communicative content of speech, and we assume that the district court's determination is correct.<sup>6</sup> \*889 *Bell*, 367 F. Supp. 3d at 975. Because Doe may not “disclose any evidence given before the grand jury” or the “name of any witness,” [Mo. Rev. Stat. § 540.320](#), the district court reasoned that the prosecuting attorney would have to examine the content of Doe's speech to find a violation of [section 540.320](#), *id.*; see also *In re Subpoena 2018R00776*, 947 F.3d 148, 155 (3d Cir. 2020) (holding that a grand jury subpoena's non-disclosure order constituted a content-based regulation subject to strict scrutiny because the order drew “distinctions based on the message”). Accordingly, we must determine whether [section 540.320](#) is narrowly tailored to achieve a compelling governmental interest as applied to the speech in which Doe avers she wants to engage. See *Reed*, 576 U.S. at 163, 135 S.Ct. 2218. We conclude that it is.

## A.

[10] We begin with a review of Missouri's purported interest in grand jury secrecy. As we have previously explained, “strict scrutiny is best described as an end-and-means test,” and as a result, we must first have a “clear understanding of what the state's interest may be” before deciding “whether the purported interest is indeed a compelling state interest.” *Republican Party of Minn. v. White*, 416 F.3d 738, 750 (8th

Cir. 2005) (en banc) (brackets and internal quotation marks omitted).

[11] The United States Constitution “presumes a role for the grand jury” in American criminal procedure through the Fifth Amendment, *United States v. Navarro-Vargas*, 408 F.3d 1184, 1189 (9th Cir. 2005) (en banc), and the Supreme Court has previously indicated that “[t]here is every reason to believe” the American grand jury “was intended to operate substantially like its English progenitor,” *Costello v. United States*, 350 U.S. 359, 362, 76 S.Ct. 406, 100 L.Ed. 397 (1956); *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 658-59, 8 L.Ed. 1055 (1834) (explaining that early American legal customs arose from the English common law). As a result, we believe the manner in which grand jury secrecy implicates the First Amendment, ratified at the same time as the Fifth, “must be linked to the grand jury’s origins.” Cf. *Navarro-Vargas*, 408 F.3d at 1189.

The grand jury is an ancient institution with roots stretching as deep as the twelfth century. See *Navarro-Vargas*, 408 F.3d at 1190. This early version of the grand jury was decidedly a tool of the English Crown. See *Butterworth*, 494 U.S. at 629, 110 S.Ct. 1376. It had two main functions—to ferret out criminals to the Crown’s officials and to “extend the central government throughout England”—and the Crown successfully controlled the grand jury by fining its members if “they failed to indict any suspect or even if they failed to indict an acceptable number of suspects.” Mark Kadish, *Behind the Locked Door of an American Grand Jury: Its History, Its Secrecy, and Its Process*, 24 Fla. St. U.L. Rev. 1, 5-6 (1996) (footnote omitted). In time, the grand jury gained a degree of independence, and by the fourteenth century, the “graunde inquest” was “[n]o longer required to make known to the court the evidence upon which they \*890 acted” but instead was “sworn to keep their proceedings secret by an oath which contained no reservation in favor of the government.” See George J. Edwards, Jr., *The Grand Jury: Considered from an Historical, Political and Legal Standpoint, and the Law and Practice Relating Thereto* 26-28 (Cosimo 2009) (1906).

At common law, the violation of grand jury secrecy was a crime, see 4 William Blackstone, *Commentaries* \*126, and jurors defended their right to secrecy as essential to the grand jury’s independence, see Sara Sun Beale et al., *Grand Jury Law & Practice* § 5.2 (2019). For instance, in 1681, King Charles II sought to convict the Earl of Shaftesbury of high treason because Shaftesbury opposed the Crown’s effort to reestablish the Catholic Church in England. See Douglas P.

Currier, Note, *The Exercise of Supervisory Powers to Dismiss a Grand Jury Indictment—a Basis for Curbing Prosecutorial Misconduct*, 45 Ohio St. L.J. 1077, 1078 (1984). A grand jury was assembled at the Old Bailey in London and a bill of indictment was placed before it. See *Earl of Shaftesbury’s Trial*, 8 How. St. Tr. 759, 771-74 (1681). The Crown moved to hear the evidence in open court, but the grand jury refused, explaining in detail the justifications for secrecy and calling upon the oath they had sworn to “keep secret” the evidence presented before them, as “hath been the constant practice of our ancestors and predecessors.” *Id.* at 771-72; see also *In re Grand Jury Subpoenas*, 454 F.3d 511, 521 (6th Cir. 2006) (discussing same); Beale, *Grand Jury Law & Practice* § 5.2 (same). One grand juror observed that “public examination of witnesses could cause suspects to flee; it could prejudice the state by providing the defendant with foreknowledge of all the state’s evidence ..., and it could impair the ability and willingness of the jurors to examine the evidence comprehensively, and ‘without favor or affection.’” See Beale, *Grand Jury Law & Practice* § 5.2 (quoting 8 How. St. Tr. at 771-74); see also *Navarro-Vargas*, 408 F.3d at 1191 (describing the trial of the Earl of Shaftesbury as the moment that “established grand jury secrecy”).

When the institution of the grand jury crossed from England to the American colonies, the rule of grand jury secrecy came with it. See *Costello*, 350 U.S. at 362, 76 S.Ct. 406. The Framers later included the Grand Jury Clause in the Fifth Amendment, “ma[king] grand jury secrecy an implicit part of American criminal procedure.” Kadish, *Behind the Locked Door*, at 16; see *Douglas Oil Co.*, 441 U.S. at 218 n.9, 99 S.Ct. 1667 (“[G]rand jury secrecy was imported into our federal common law and is an integral part of our criminal justice system.”); Joseph L. Story, 3 *Commentaries on the Constitution of the United States* § 1778 (1833) (noting that the grand jury members “sit in secret, and examine the evidence laid before them by themselves”). Over time, courts adopted reasons similar to those expressed by the grand juror at the trial of the Earl of Shaftesbury to justify the grand jury’s secrecy. See *Dionisio*, 410 U.S. at 17 n.15, 93 S.Ct. 764 (“[T]he institution was adopted in this country, and is continued from considerations similar to those which give to it its chief value in England ....”). For example, in 1917, a court explained that secrecy is essential because publicity could undermine justice by “warning offenders to escape, to destroy evidence, or to tamper with witnesses.” *United States v. Providence Tribune Co.*, 241 F. 524, 526 (D.R.I. 1917). The court also explained that secrecy protected the

reputations of the unindicted accused and encouraged the candor of witnesses. *Id.*

These justifications have now been widely accepted in American courts as validating the rule of grand jury secrecy. *See, e.g.,* \*891 *In re Subpoena 2018R00776*, 947 F.3d at 157; *In re Grand Jury Process, Doe*, 814 F.3d 906, 909 (8th Cir. 2015); *Illinois v. F.E. Moran, Inc.*, 740 F.2d 533, 539 (7th Cir. 1984) (Posner, J.) (“[T]he view that grand jury secrecy is very much worth preserving even after the grand jury has been discharged ... is far too well established ... to be questioned by us.”); *United States v. Rose*, 215 F.2d 617, 628-29 (3d Cir. 1954) (delineating these justifications as the basis for grand jury secrecy). The Supreme Court has repeatedly ratified them. *See, e.g., Douglas Oil Co.*, 441 U.S. at 218, 99 S.Ct. 1667; *United States v. Procter & Gamble Co.*, 356 U.S. 677, 681 & n.6, 78 S.Ct. 983, 2 L.Ed.2d 1077 (1958).

Indeed, the Court has recognized that “several distinct interests [are] served by safeguarding the confidentiality of grand jury proceedings,” explaining that

if preindictment proceedings were made public, many prospective witnesses would be hesitant to come forward voluntarily, knowing that those against whom they testify would be aware of that testimony. Moreover, witnesses who appeared before the grand jury would be less likely to testify fully and frankly, as they would be open to retribution as well as to inducements. There also would be the risk that those about to be indicted would flee, or would try to influence individual grand jurors to vote against indictment. Finally, by preserving the secrecy of the proceedings, we assure that persons who are accused but exonerated by the grand jury will not be held up to public ridicule.

*Douglas Oil Co.*, 441 U.S. at 218-19, 99 S.Ct. 1667.

Other jurists have concluded that the secrecy of *who* makes up the grand jury also serves to legitimate its decisions and to shield grand jurors from intimidation and harassment both during and after their service, ensuring their deliberation is not driven by concerns beyond the scope of the charged crime and the presented evidence. *See Butterworth*, 494 U.S. at 636-37, 110 S.Ct. 1376 (Scalia, J., concurring); *United States v. Amazon Indus. Chem. Corp.*, 55 F.2d 254, 261 (D. Md. 1931); *Goldman*, 471 S.W.3d at 817. It is thus no surprise that Missouri also recognizes these traditional interests in grand jury secrecy. *See McCulloch*, 2016 WL 9000971, at \*4 (stating that “grand jury secrecy is intended to protect the public welfare” because it “protect[s] the jurors themselves,”

“promote[s] a complete freedom of disclosure,” “prevent[s] the escape of a person indicted before he may be arrested,” and “protect[s] the reputations of persons against whom no indictment may be found”); *see also Mannon v. Frick*, 365 Mo. 1203, 295 S.W.2d 158, 162 (1956) (reasoning similarly).

[12] We have previously explained that what constitutes a compelling interest “is not easily defined,” but we have recognized that a state advances a compelling interest when a policy is necessary for “upholding the administration of justice.” *White*, 416 F.3d at 749-50, 750 n.5. This is because the administration of justice is an “interest of the highest order” and an “overriding state interest.” *See id.* at 749 (brackets omitted); *see also Williams-Yulee*, 575 U.S. at 437-38, 444, 135 S.Ct. 1656 (holding that Florida had a compelling interest in regulating how judicial candidates solicited campaign funds because of the state’s overriding interest in “assur[ing] its people that judges will apply the law without fear or favor”).

[13] The Supreme Court has frequently observed that secrecy ensures the grand jury fulfills its “dual function” as both a sword and shield of American criminal law, “ferret[ing] out crimes deserving of prosecution” and “screen[ing] out charges not warranting prosecution.” *See, e.g.,* \*892 *United States v. Sells Eng’g, Inc.*, 463 U.S. 418, 424, 103 S.Ct. 3133, 77 L.Ed.2d 743 (1983) (“Grand jury secrecy, then, is as important for the protection of the innocent as for the pursuit of the guilty.” (internal quotation marks omitted)). In fact, “the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings” so much so that the Court has referred to its confidentiality as “vital.” *Rehberg v. Paulk*, 566 U.S. 356, 374, 132 S.Ct. 1497, 182 L.Ed.2d 593 (2012).

We think it thus beyond dispute that secrecy is an integral component to a functioning grand jury system and that once a state chooses to adopt it as a mechanism for screening indictments, the grand jury’s secrecy becomes an interest of the highest order because it is necessary for “upholding the administration of justice.” *See White*, 416 F.3d at 749-50 & n.5; *Butterworth*, 494 U.S. at 629-30, 110 S.Ct. 1376; *In re Grand Jury Subpoenas*, 454 F.3d at 521 (“Grand jury secrecy is thus a strong command, and federal courts must recognize that, for the system to function properly, grand jury proceedings must be conducted essentially in a vacuum, free from outside influence and sufficiently enveloped so that grand jury information is not disclosed to the general public.” (internal quotation marks omitted)). As a result,

Missouri has demonstrated [section 540.320](#) advances a compelling governmental interest.

B.

[14] Doe asserts that even if grand jury secrecy ordinarily constitutes a compelling interest, [section 540.320](#)'s requirement that she not disclose evidence or witness names is no longer narrowly tailored to advance that interest because McCulloch took the "extraordinary" step of releasing evidence and other information concerning the proceedings of the grand jury. Doe contends that the volume of information that is now public militates in favor of permitting her to speak broadly on issues that have not previously been disclosed. We disagree.

[15] [16] [17] For a statute to be narrowly tailored, it must be the least restrictive means of serving the government's interest. See *McCullen*, 573 U.S. at 486, 134 S.Ct. 2518. "A narrowly tailored regulation is one that actually advances the state's interest," "does not sweep too broadly," "does not leave significant influences bearing on the interest unregulated," and "could be replaced by no other regulation that could advance the interest as well with less infringement of speech." *White*, 416 F.3d at 752. "This narrow tailoring requirement means ... that the factual situation demonstrates a real need for the government to act to protect its interests." *Willson v. City of Bel-Nor*, 924 F.3d 995, 1001 (8th Cir. 2019).

[18] First, we think it self-evident that [section 540.320](#) continues to "actually advance[ ] the state's interest." See *White*, 416 F.3d at 752. [Section 540.320](#) protects the identity of witnesses and keeps confidential the specific information they provided to the grand jury. See *Illinois v. Abbott & Assocs., Inc.*, 460 U.S. 557, 566 n.11, 103 S.Ct. 1356, 75 L.Ed.2d 281 (1983). McCulloch did not release this information, and it simply is not the case that the state forfeits its interest in maintaining the secrecy of all grand jury materials and proceedings merely because it chooses to disclose some information. See *United States v. Broyles*, 37 F.3d 1314, 1318 (8th Cir. 1994) (denying the release of grand jury minutes even after the defendant was indicted and prosecuted).

Second, Missouri maintains an interest in protecting the secrecy of the grand jury's deliberative process. See *In re Grand Jury Proceedings Relative to Perl*, 838 F.2d 304, 306 (8th Cir. 1988) (noting that the rule of secrecy is designed

"to preserve the freedom and integrity of the deliberative process"). McCulloch did not \*893 reveal any information regarding the grand jury's membership, deliberations, or voting, and we believe Missouri maintains an interest in keeping this information—including Doe's own views—secret. See *United States v. Nixon*, 418 U.S. 683, 705, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974) (explaining that when participants in a discussion expect the public dissemination of their remarks, they "may well temper candor with a concern for appearances ... to the detriment of the decisionmaking process"). Confidentiality "helps to assure ... that grand jurors will not be intimidated in the execution of their duties by the fear of unjustified public criticism." See *Butterworth*, 494 U.S. at 636-37, 110 S.Ct. 1376 (Scalia, J., concurring). And it does not suffice to say that grand jurors could respond to that criticism because permitting them to respond "would have its own adverse effects, including the subjection of grand jurors to a degree of press attention and public prominence that might in the long run deter citizens from fearless performance of their grand jury service." *Id.*

Third, [section 540.320](#) protects the unindicted accused from public ridicule or other opprobrium. See *Douglas Oil Co.*, 441 U.S. at 218-19, 99 S.Ct. 1667. To be sure, in a case where the name of the accused and the facts are widely known, this concern is of less importance. But the fact that much of the evidence is public does not lessen Missouri's compelling interest in ensuring individual members of the grand jury do not use the information they gathered as part of the grand jury process to impugn the innocence of the accused with charges they could not agree to collectively. See *id.* at 218 n.8, 99 S.Ct. 1667 (noting that petitioners were entitled to the "protection" of grand jury secrecy even though they had already been indicted and had pleaded *nolo contendere*). Only the grand jury *as a whole* is in a position to have competently considered the credibility of witnesses as well as the relevant evidence. Thus, the fact that much of the evidence is publicly available does not diminish Missouri's concern for protecting the accused's reputational interest, having subjected him to the grand jury process in the first place. See *id.* at 222, 99 S.Ct. 1667 ("The interests in grand jury secrecy, although reduced, are not eliminated merely because the grand jury has ended its activities.").

Next, we do not believe the challenged provision sweeps too broadly. See *In re April 1956 Term Grand Jury*, 239 F.2d 263, 272 (7th Cir. 1956) (concluding that "the safeguard of secrecy, in the interest of the public, continues even after the grand jury has completed its efforts"). Doe does not claim that she

is prevented from discussing anything concerning the Wilson matter other than the knowledge she gained of the evidence, witness identities, and deliberations in the context of her role as a grand juror. Section 540.320's requirement that Doe not disclose matters she learned as part of her grand jury service is a limitation on Doe's speech that is "narrowly drawn" to protect the interests highlighted above. See *United States v. Anderson*, 759 F.3d 891, 895 (8th Cir. 2014).

Neither do we believe that section 540.320 is underinclusive; that is, it does not permit "vast swaths" of speech that undermine the state's compelling interest such that the statute cannot be said to "advance its stated purpose." See *Williams-Yulee*, 575 U.S. at 448-49, 135 S.Ct. 1656. "It is always somewhat counterintuitive to argue that a law violates the First Amendment by abridging *too little* speech," but "underinclusiveness can raise doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint." *Id.* at 448, 135 S.Ct. 1656 (internal quotation marks omitted). "Underinclusiveness can also reveal that a law does not actually advance a compelling interest." \*894 *Id.* at 449, 135 S.Ct. 1656. Here, we see "no fatal underinclusivity concerns." See *id.* No information concerning any grand juror's view of the evidence or witnesses' credibility has been released, and their votes remain confidential. Indeed, the grand jurors' deliberations were not transcribed at all, and as a result, could only become public if a grand juror chose to violate her oath.

Finally, we conclude there is no more limited means by which Missouri can advance its interest in preserving the functioning of the grand jury system. If Doe were to speak on the quality of the evidence, the credibility of witnesses, or the deliberations of fellow jurors concerning the same, she would necessarily undermine the functioning of the grand jury. Witnesses in future cases may be less candid. The unindicted may face unending questions about culpability as juror after juror comes forward with their own view of the evidence, feeling pressured to respond either to challenge or defend Doe's views, lest their collective decision be mischaracterized. And in future cases, jurors might hesitate to discuss matters candidly or to vote their conscience out of fear of future publicity. See *Butterworth*, 494 U.S. at 636-37, 110 S.Ct. 1376 (Scalia, J., concurring); *Douglas Oil Co.*, 441 U.S. at 222, 99 S.Ct. 1667 (explaining that in evaluating grand jury disclosures, "courts must consider not only the immediate effects upon a particular grand jury, but also the possible effect upon the functioning of future grand juries").

The Supreme Court's holding in *Butterworth* is not to the contrary. 494 U.S. 624, 110 S.Ct. 1376. There, the Court held that a witness who testified before a Florida grand jury could not be prohibited from disclosing the substance of his testimony after the term of the grand jury had ended. 494 U.S. at 626, 110 S.Ct. 1376. But the Court purposely did not address the right of a witness to discuss his "experience" before the grand jury. *Id.* at 629 n.2, 110 S.Ct. 1376. It instead limited its holding to allow the witness to "divulge information of which he was in possession before he testified before the grand jury, and not information which he may have obtained as a result of his participation in the proceedings of the grand jury." *Id.* at 631-32, 110 S.Ct. 1376. This case thus varies from *Butterworth* in a critical way: Doe proposes to divulge information that she obtained *as a direct result* of her participation in the Wilson grand jury. See *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 37, 104 S.Ct. 2199, 81 L.Ed.2d 17 (1984) (holding that a protective order prohibiting a newspaper from publishing information which it had obtained through discovery procedures did not violate the First Amendment).

Accordingly, we hold that, as applied to Doe, section 540.320 of the Missouri Revised Statutes is narrowly tailored to serve Missouri's compelling interest in preserving the functioning of its grand jury system. As a result, it is the "rare case" of a speech restriction that survives strict scrutiny review. See *Burson v. Freeman*, 504 U.S. 191, 211, 112 S.Ct. 1846, 119 L.Ed.2d 5 (1992) (plurality op.) (upholding under strict scrutiny review a content-based law that required "solicitors to stand 100 feet from the entrances to polling places" because "the right to cast a ballot in an election free from the taint of intimidation and fraud" trumped other free speech rights); *cf.* *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995) ("[W]e wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.'").<sup>7</sup>

### \*895 III.

For the foregoing reasons, we affirm.

### All Citations

969 F.3d 883

## Footnotes

- 1 Wesley J.C. Bell succeeded Robert P. McCulloch in his official capacity as the Prosecuting Attorney for St. Louis County, Missouri on January 1, 2019. Pursuant to [Federal Rule of Civil Procedure 25\(d\)](#), the district court substituted Bell for McCulloch as the named defendant, and the case comes to us with the above caption.
- 2 The Honorable Rodney W. Sippel, Chief Judge, United States District Court for the Eastern District of Missouri.
- 3 The district court granted Doe's motion to proceed pseudonymously and thereafter used female pronouns in its orders. Consistent with the district court and our previous opinion in this matter, see [Doe v. McCulloch](#), 835 F.3d 785, 786 n.1 (8th Cir. 2016), we also use female pronouns throughout this opinion.
- 4 We refer to the defendant as Missouri in the rest of this opinion because of the nature of Doe's claim.
- 5 Doe does not appeal the district court's determination that she lacks standing to challenge [sections 540.080, 540.120, and 540.310 of the Missouri Revised Statutes](#). Thus, we only address the constitutionality of [section 540.320](#). See [Constanza v. Holder](#), 647 F.3d 749, 753 n.2 (8th Cir. 2011) (per curiam) (declining to address an argument abandoned by the appellant).
- 6 Missouri's restrictions on Doe's speech may not be subject to strict scrutiny. At the time of the First Amendment's ratification, the grand jury had operated in secret both in England and the colonies for centuries. See [Butterworth](#), 494 U.S. at 629, 110 S.Ct. 1376. As a result, the founding generation incorporated the tradition of secrecy surrounding grand jury proceedings as a vital means of implementing its function by ensuring its impartiality. See [Douglas Oil Co. of Cal. v. Petrol Stops Nw.](#), 441 U.S. 211, 218-19, 218 n.9, 99 S.Ct. 1667, 60 L.Ed.2d 156 (1979). This history sits uncomfortably with the notion that speech restrictions in the service of protecting grand jury secrecy are "presumptively invalid." See [R.A.V. v. City of St. Paul](#), 505 U.S. 377, 382-83, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992); [Goodman v. United States](#), 108 F.2d 516, 520 (9th Cir. 1939) ("It has never been supposed that grand jurors are deprived of the constitutional right of free speech through the oath of secrecy which they take ...."). Further, in [Butterworth](#), the Supreme Court did not apply strict scrutiny when evaluating a state secrecy requirement concerning the testimony of grand jury witnesses, 494 U.S. at 632, 110 S.Ct. 1376, even though the Court introduced the distinction between laws that are content based and laws that are content neutral and applied strict scrutiny to a content-based law as early as its decision in [Police Department of Chicago v. Mosley](#), 408 U.S. 92, 100-01, 92 S.Ct. 2286, 33 L.Ed.2d 212 (1972).
- 7 Doe implores us to consider federal court interpretations of [Federal Rule of Criminal Procedure 6\(e\)](#), but that rule has no bearing on the constitutionality of Missouri's grand jury secrecy regulations. Although these cases pertain to the release of grand jury material, they do not address a juror's rights under the Free Speech Clause. See, e.g., [In re Grand Jury Subpoena, Judith Miller](#), 493 F.3d 152, 154 (D.C. Cir. 2007) (per curiam) (explaining that "there is no First Amendment right of access to secret grand jury matters," and instead, in federal cases, "Rule 6(e) governs what [the court] may or may not release to the public"). And even if it were relevant to Doe's claim, [Rule 6\(e\)](#) specifically prohibits "a grand juror" from "disclos[ing]" any matter occurring before the grand jury, including "the grand jury's deliberations or any grand juror's vote." [Fed. R. Crim. P. 6\(e\)\(2\)\(B\)\(i\), 6\(e\)\(3\)\(A\)](#).

542 S.W.3d 354  
Missouri Court of Appeals, Eastern District,  
DIVISION FOUR.

Grand Juror DOE, Appellant,  
v.  
Robert P. MCCULLOCH, Respondent.

No. ED 105181

Filed: December 12, 2017

Motion for Rehearing and/or Transfer to  
Supreme Court Denied January 30, 2018

Application for Transfer to Supreme  
Court Denied April 3, 2018

**Synopsis**

**Background:** Former member of grand jury filed action for declaratory judgment against prosecutor seeking an exception to the secrecy obligations on grand jury proceedings. The Circuit Court, St. Louis County, [Ellen H. Ribaud](#), J., granted prosecutor's motion to dismiss for failure to state a claim. Former juror appealed.

**Holdings:** The Court of Appeals, [Colleen Dolan](#), P.J., held that:

[1] declaratory and injunctive relief would not have had a conclusive effect in former juror's action;

[2] court could reach merits of juror's First Amendment claim; and

[3] exceptions to rules of grand jury secrecy did not apply.

Affirmed.

West Headnotes (17)

[1] **Appeal and Error** 🔑 De novo review

A judgment sustaining a motion to dismiss for failure to state a claim upon which relief can be granted is reviewed de novo. *Mo. Sup. Ct. R. 55.27(a)(6)*.

[2] **Pretrial Procedure** 🔑 Insufficiency in general

A motion to dismiss for failure to state a claim is solely a test of the adequacy of a plaintiff's petition.

[3] **Pretrial Procedure** 🔑 Construction of pleadings

**Pretrial Procedure** 🔑 Presumptions and burden of proof

On a motion to dismiss for failure to state a claim, the facts alleged in the petition are assumed to be true, and all reasonable inferences are liberally construed in favor of the plaintiff. *Mo. Sup. Ct. R. 55.27(a)(6)*.

[4] **Pretrial Procedure** 🔑 Construction of pleadings

On a motion to dismiss for failure to state a claim, the petition is reviewed in an almost academic manner, to determine if the facts alleged meet the elements of a recognized cause of action, or of a cause that might be adopted in that case. *Mo. Sup. Ct. R. 55.27(a)(6)*.

[5] **Appeal and Error** 🔑 Dismissal or nonsuit

The Court of Appeals will affirm a trial court's dismissal if it is justified on any grounds alleged in the motion to dismiss.

[6] **Grand Jury** 🔑 Secrecy as to Proceedings

Grand jury proceedings are conducted in secret in order to protect and promote the public welfare, to protect the jurors themselves, to promote a complete freedom of disclosure, to prevent the escape of a person to be indicted before he may be arrested, to prevent the

subornation of perjury in an effort to disprove facts testified to, and to protect the reputations of persons against whom no indictment may be found. *Mo. Ann. Stat.* §§ 540.080, 540.310, 540.320.

[7] **Declaratory Judgment** 🔑 Construction and operation of judgment

Declaratory and injunctive relief, sought by former grand juror in widely publicized police shooting case, in which juror sought to prevent prosecutor from enforcing grand jury secrecy statutes against former juror, would not have had a conclusive effect in former juror's action against prosecutor; grand jury secrecy laws could still have been enforced by other government officials. *Mo. Ann. Stat.* §§ 540.080, 540.310, 540.320.

1 Cases that cite this headnote

[8] **Declaratory Judgment** 🔑 Pendency of other action

Trial court could reach merits of First Amendment federal claim of former member of grand jury in a high profile police shooting case, who brought declaratory action against prosecutor seeking an exception to the secrecy obligations on grand jury proceedings; although juror's freedom of speech claim was pending in federal court, juror injected the freedom of speech issue into state petition by arguing the grand jury secrecy statutes were unconstitutional as applied to her, and juror's state law claims required court to address the scope of juror's rights under the First Amendment. *U.S. Const. Amend. 1*; *Mo. Const. art. 1, § 8*; *Mo. Ann. Stat.* §§ 540.080, 540.310, 540.320.

1 Cases that cite this headnote

[9] **Federal Courts** 🔑 Conclusiveness; res judicata and collateral estoppel

Generally, federal courts accord preclusive effect to state courts' resolution of issues.

[10] **Federal Courts** 🔑 Reservation or retention of jurisdiction

Often times, when there is a possibility that a federal constitutional challenge can be avoided by construing a state statute in a certain manner, federal courts will abstain from reviewing a complaint on the merits and wait for a state court to construe the statute pursuant to the state's laws.

[11] **Federal Courts** 🔑 Right to Decline Jurisdiction; Abstention

The purpose of abstention of the exercise of federal jurisdiction is to avoid resolving the federal question by encouraging a state-law determination that may moot the federal controversy.

[12] **Federal Courts** 🔑 Reservation or retention of jurisdiction

A proper *England* reservation of federal claims affords the petitioner the opportunity to have her state-law issues resolved in state court and reserves the right to return to federal district court to have her constitutional claim heard in a federal forum.

[13] **Federal Courts** 🔑 Reservation or retention of jurisdiction

The effective reservation of a federal claim is dependent on the condition that plaintiffs take no action to broaden the scope of the state court's review beyond decision of the antecedent state-law issue.

[14] **Grand Jury** 🔑 Showing irregularity of grand jury proceeding; impeaching indictment

Exceptions to rules of grand jury secrecy did not apply to former grand juror in high profile police shooting case, who brought declaratory action against prosecutor seeking an exception to secrecy obligations on grand jury proceedings; juror wished to express opinions about her impression that evidence was

presented differently in case at issue than in other cases presented to same grand jury, thus, the exception juror sought was not just limited to the grand jury proceedings at issue, but would have allowed her to disclose information from potentially hundreds of matters. [Mo. Ann. Stat. §§ 540.080, 540.310, 540.320](#).

**[15] Constitutional Law** 🔑 Making, Interpretation, and Application of Statutes

The role of the judiciary is to enforce the laws enacted by the legislature and to try to effectuate the legislature's intent.

[1 Cases that cite this headnote](#)

**[16] Constitutional Law** 🔑 Policy  
**Constitutional Law** 🔑 Wisdom  
**Constitutional Law** 🔑 Desirability

It is not province of court to question wisdom, social desirability, or economic policy underlying statute, as these are matters for legislature's determination.

**[17] Grand Jury** 🔑 Necessity; use in or connection with judicial proceeding

In considering whether the circumstances of a case may necessitate an exception to the grand juror secrecy rules, the Court of Appeals must weigh the reasons for secrecy against the present need for disclosure.

\*356 Appeal from St. Louis County Circuit Court, Cause No. 15SL-CC01891, Honorable [Ellen H. Ribaldo](#), Judge

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**OPINION**

[Colleen Dolan](#), P.J.

Grand Juror Doe (“Doe”) was a member of the St. Louis County grand jury that declined to indict former police officer Darren Wilson for actions related to the August 9, 2014 shooting of Michael Brown. Doe began serving on the grand jury on May 7, 2014, at which time she was administered her oath of secrecy. Doe has brought federal and state law claims against the respondent, Robert P. McCulloch (“McCulloch”), who is the elected prosecutor of St. Louis County. Doe alleges that McCulloch's handling of the case, such as how evidence was presented, “differed significantly from how evidence was presented in the hundreds of other matters presented to her and the other empaneled grand jurors earlier that same term.” More specifically, amongst other things, Doe alleges that “the evidence was presented in a way that implied Brown was the wrongdoer and not Wilson[.]”

Doe seeks an exception to the secrecy obligations imposed by various Missouri Revised Statutes, including §§ 540.080, 540.310, and 540.320, as she wishes to “speak publicly about her experience on the grand jury” and “contribute to the current dialogue concerning race relations.”<sup>1</sup> Initially, Doe filed a complaint in federal district court on January 5, 2015, “alleging only that her First Amendment rights were being violated by §§ 540.080, 540.120, 540.310, and 540.320, as well as any other provision of Missouri law prohibiting Doe from discussing or expressing an[y] opinions related to her grand jury service.”<sup>2</sup> [Doe v. McCulloch](#), 106 F.Supp.3d 1007 (E.D. Mo. 2015), *vacated*, 835 F.3d 785 (8th Cir. 2016). The federal district court decided to abstain from exercising jurisdiction over Doe's claims and dismissed her complaint. However, even though the United States Court of Appeals, Eighth Circuit found “[t]he district court did not err in abstaining from exercising jurisdiction,” it held that the district court should have retained jurisdiction and stayed the proceedings while the parties litigated state-law issues in Missouri state courts instead of dismissing the case. *Id.* at 788–89. Accordingly, the district court's \*357 judgment was vacated and remanded for further proceedings. *Id.* at 789. The Eighth Circuit ordered the district court to stay Plaintiff's First Amendment claims pending resolution as it pertains to state

law issues in Missouri's state courts, including whether Doe's suit was brought against the wrong party or filed in the wrong venue. *Id.* at 788–89 n.2.

Doe then filed her petition in St. Louis County Circuit Court on June 2, 2015. Her petition contained three counts:

- Count I—a violation of the Free Speech Clause of the First Amendment in that Doe is reasonably chilled from engaging in expressive activity because certain Missouri laws, such as §§ 540.080, 540.310, and 540.320, prohibit grand jurors from discussing the grand jury proceedings, for which Doe sought declaratory and injunctive relief preventing McCulloch from enforcing Missouri's laws regarding grand jury secrecy requirements;
- Count II—a request for a declaratory judgment that § 540.320 is not applicable to her under the unique circumstances of this case; and
- Count III—a request for a declaratory judgment that Doe should be released from her secrecy oath due to McCulloch's own disclosures of the grand jury proceedings and “the unique circumstances of this case[.]”

On July 16, 2015, McCulloch filed a motion to dismiss pursuant to Rule 55.27(a)(6), arguing Doe failed to state a claim upon which relief could be granted. The trial court granted Defendant's motion and all of Doe's claims were dismissed with prejudice. This appeal follows.

## I. STANDARD OF REVIEW

[1] [2] [3] [4] [5] The Supreme Court of Missouri has explained the appropriate standard of review for this type of case:

A judgment sustaining a motion to dismiss for failure to state a claim upon which relief can be granted is reviewed de novo. A motion to dismiss for failure to state a claim is solely a test of “the adequacy of a plaintiff's petition.” Exhibits attached to the petition are reviewed as part of the petition. The facts alleged in the petition are assumed to be true, and all reasonable inferences are liberally construed in favor of the plaintiff. The petition is reviewed in an almost academic manner, to determine if the facts alleged meet the elements of a recognized cause of action, or of a cause that might be adopted in that case.

*Smith v. Humane Soc'y of United States*, 519 S.W.3d 789, 797–98 (Mo. banc 2017) (internal citations omitted). We will affirm the trial court's dismissal if it is justified on any grounds alleged in the motion. *Anderson v. Union Elec. Co.*, 463 S.W.3d 783, 786 (Mo. banc 2015).

## II. DISCUSSION

### **a. Introduction to Grand Jury Secrecy**

[6] “In Missouri, grand jury proceedings are conducted in secret.” *State ex rel. Roe v. Goldman*, 471 S.W.3d 814, 817 (Mo. App. E.D. 2015) (citing §§ 540.320, 540.080, and 540.110). The secrecy requirement was adopted to “protect and promote the public welfare.” *Id.* More specifically, “[t]he proceedings are conducted in secret to protect the jurors themselves, to promote a complete freedom of disclosure, to prevent the escape of a person to be indicted before he may be arrested, to prevent the subornation of perjury in an effort to disprove facts testified to, and to protect the reputations of persons against whom no indictment may be found.” *Id.* The Supreme Court of the United States has echoed this sentiment:

\*358 We consistently have recognized that the proper functioning of our grand jury system depends upon the secrecy of the grand jury proceedings. In particular, we have noted several distinct interests served by safeguarding the confidentiality of grand jury proceedings. First, if preindictment proceedings were made public, many prospective witnesses would be hesitant to come forward voluntarily, knowing that those against whom they testify would be aware of that testimony. Moreover, witnesses who appeared before the grand jury would be less likely to testify fully and frankly, as they would be open to retribution as well as to inducements. There also would be the risk that those about to be indicted would flee, or would try to influence individual grand jurors to vote against indictment. Finally, by preserving the secrecy of the proceedings, we assure that persons who are accused but exonerated by the grand jury will not be held up to public ridicule.

*Butterworth v. Smith*, 494 U.S. 624, 630, 110 S.Ct. 1376, 1380, 108 L.Ed.2d 572 (1990) (quoting *Douglas Oil Co. of California v. Petrol Stops Nw.*, 441 U.S. 211, 218–19, 99 S.Ct. 1667, 1672–73, 60 L.Ed.2d 156 (1979)).

### **b. Relevant Missouri Grand Jury Secrecy Statutes**

The three Missouri grand jury secrecy statutes identified as relevant in Doe's petition read as follows:

§ 540.080. Oath of grand jurors

Grand jurors may be sworn in the following form:

Do you solemnly swear you will diligently inquire and true presentment make, according to your charge, of all offenses against the laws of the state committed or triable in this county of which you have or can obtain legal evidence; the counsel of your state, your fellows and your own, you shall truly keep secret? You further swear that you will present no one for any hatred, malice or ill will; neither will you leave unrepresented any one for love, fear, favor or affection, or for any reward or the hope or promise thereof, but that you will present things truly as they come to your knowledge, to the best of your understanding, according to the laws of this state, so help you God.

§ 540.110. Foreperson—powers and duties—oath

The foreperson of every grand jury, from the time of his appointment to his discharge, shall be authorized to administer any oath, declaration or affirmation, in the manner prescribed by law, to any witness who shall appear before such grand jury, for the purpose of giving evidence in any matter cognizable by them. In addition to the usual oath, the foreperson, before such witness shall testify, shall administer to him or her the following oath:

Do you further solemnly swear, or affirm, that you will not after your examination here, directly or indirectly, divulge or make known to any person or persons the fact that this grand jury has or has had under consideration the matters concerning which you shall be examined, or any other fact or thing which may come to your knowledge while before this body, or concerning which you shall here testify, unless lawfully required to testify in relation thereto?

§ 540.320. Grand juror not to disclose evidence—penalty

No grand juror shall disclose any evidence given before the grand jury, nor the name of any witness who appeared before them, except when lawfully required to testify as a witness in relation thereto; nor shall he disclose the fact of \*359 any indictment having been found against any person for a felony, not in actual confinement, until the defendant shall have been arrested thereon. Any juror violating the provisions of this section shall be deemed guilty of a class A misdemeanor.

**c. Overview of the Issues Presented**

In the trial court's Judgment, it aptly identified and articulated some of the issues now before us:

[Doe] does not specify in her Petition what she would like to say, or what evidence or other materials, specifically, she would like to disclose. Rather, Plaintiff alleges generally that she would like to discuss her experience as a grand juror, and she alleges that she would like to use her experience as a grand juror, and she alleges that she would like to use her experience to contribute to the current public dialogue concerning race relations, to educate the public, and to advocate for legislative change.

[Doe] is seeking an order completely invalidating Missouri's grand jury secrecy laws as applied to her, not an order that allows her to make certain disclosures for certain purposes. As such, [Doe's] purposes in seeking freedom from Missouri's secrecy laws are not relevant here.

Under normal circumstances, Missouri grand jurors are not permitted to make any of the disclosures contemplated by Plaintiff, regardless of their purpose. *See* §§ 540.080, 540.310, 540.320, 540.330. Therefore, in order for [Doe] to succeed, she must explain how her circumstances are unique, and why an exception to the rule of secrecy should be made for her in this case.

Doe has only directed us to, and our research has only revealed, one case in which an exception to Missouri's grand jury secrecy laws has been granted to grand jurors. The exception was granted under very unique circumstances in a case handed down by the United States District Court for the Western District of Missouri in 1962. *Palmentere v. Campbell*, 205 F.Supp. 261 (W.D. Mo. 1962). There, the court found that disclosure of certain grand jury details was necessary for the grand jurors to be able to mount a defense in a lawsuit brought against them for their alleged conduct committed in the course of the grand jury proceedings. *Id.* at 263. With that in mind, we turn to the merits of the four points Doe offers on appeal.

**d. Point I—Practical Effect of Declaratory Judgments Sought**

[7] Doe argues the trial court “mistakenly concluded that it could provide no relief that would have a practical effect.” First, we must note that we are unclear if Doe's premise is correct. We find the trial court concluded that it could provide no relief that would have a practical effect only as it pertains to the enforcement of §§ 540.080 and 540.310. The trial court

never explicitly rejected the idea that preventing enforcement of § 540.320 would have a practical effect. In fact, the court appears to have implicitly accepted that § 540.320 would have a practical effect.<sup>3</sup> \*360 This is further supported by the fact that the trial court never questions the justiciability of the petition, never mentions the potential for issuing an advisory opinion, and fully addresses whether Doe adequately states a claim in any of her three counts in the petition. For the reasons expressed *infra* in this section, we find that only § 540.320 would have a practical effect, which appears to be consistent with the trial court's finding. However, whether Point I is considered “denied” or “granted in part” (as it concerns § 540.320), it yields the same result: we find that preventing McCulloch from enforcing § 540.320 against Doe would have a practical effect. Accordingly, we will address Doe's remaining points on appeal.

The Supreme Court of Missouri has explained that “[a] declaratory judgment should have a conclusive effect and should lay to rest the parties' controversy.” *Missouri Soybean Ass'n v. Missouri Clean Water Comm'n*, 102 S.W.3d 10, 25 (Mo. banc 2003). In the case before us, declaratory and injunctive relief preventing McCulloch from enforcing §§ 540.080 and 540.310 would not have a conclusive effect. Doe argues that “[a] declaratory judgment prohibiting enforcement [by McCulloch] would have the practical effect of allowing [her] to speak both publicly and privately about her experience as a grand juror without fear or prosecution.” However, as Doe acknowledges in her petition, grand jury secrecy laws could still be enforced by other government officials.

For example, the St. Louis County Circuit Court retains primary authority to enforce §§ 540.080 and 540.310 against Doe through contempt proceedings, and the court may appoint an attorney to represent the court or the state. *See* Rule 36.01; *see also* *Smith v. Pace*, 313 S.W.3d 124, 130 (Mo. banc 2010) (citing *Osborne v. Purdome*, 244 S.W.2d 1005, 1012 (Mo. banc 1951)) (explaining that all courts of record in Missouri have the power to punish for criminal contempt committed inside and outside of the court).<sup>4</sup> Thus, granting Doe the relief sought would not have a “conclusive effect” as it pertains to §§ 540.080 or 540.310. *See* *Missouri Soybean Ass'n*, 102 S.W.3d at 25.

Based on the foregoing, we deny Point I. However, we still find that there is a justiciable controversy as to the application of § 540.320. Accordingly, we will address Doe's remaining three points.

#### e. Point II—Trial Court's Authority to Rule on Count I

[8] In her second point on appeal, Doe contends that the trial court “erred in reaching the merits of Doe's federal constitutional claim [based on freedom of speech]—and dismissing it with prejudice—because that claim was not before the [trial] court,” as it was pending in the federal district court. However, we find Doe injected the freedom of speech issue into the petition. In her petition, Doe argued the grand jury secrecy statutes were unconstitutional as applied to her, and the only constitutional right she refers to is freedom of speech. Thus, the trial court could only address that argument by considering how the grand jury secrecy statutes potentially affected Doe's freedom of speech.

#### i. The *England* Reservation

[9] [10] [11] [12] [13] Generally, federal courts accord preclusive effect to state courts' resolution of issues. \*361 *Allen v. McCurry*, 449 U.S. 90, 95, 101 S.Ct. 411, 415, 66 L.Ed.2d 308 (1980). Often times, when there is a possibility that a federal constitutional challenge can be avoided by construing a state statute in a certain manner, federal courts will abstain from reviewing a complaint on the merits and wait for a state court to construe the statute pursuant to the state's laws. *San Remo Hotel, L.P. v. City & County of San Francisco Cal.*, 545 U.S. 323, 324, 125 S.Ct. 2491, 2493, 162 L.Ed.2d 315 (2005). The purpose of abstention is to avoid resolving the federal question by encouraging a state-law determination that may moot the federal controversy. *Id.* A proper *England* reservation affords the petitioner the opportunity to have her state-law issues resolved in state court and reserves “the right to return to federal district court to have her constitutional claim heard in a federal forum.” *McCulloch*, 835 F.3d at 787 (citing *See England v. La. State Bd. of Med. Exam'rs*, 375 U.S. 411, 421–22, 84 S.Ct. 461, 11 L.Ed.2d 440 (1964)). However, the United States Supreme Court has made it “perfectly clear that the effective reservation of a federal claim [is] dependent on the condition that plaintiffs take no action to broaden the scope of the state court's review beyond decision of the antecedent state-law issue.” *San Remo Hotel, L.P.*, 545 U.S. at 340, 125 S.Ct. at 2503.

Doe sought to make a proper *England* reservation, as explained in Paragraph 2 of her petition and a footnote under Count I, which reads:

Count I is set forth here for the sole purpose of allowing this Court to construe the relevant statutes against a backdrop of Plaintiff's federal constitutional challenge. Should Missouri's courts hold against Doe on questions of state law, Doe intends to return to the United States District Court for disposition of the federal claim.

Nonetheless, relying on *Kansas City Premier Apartments, Inc. v. Missouri Real Estate Comm'n*, 344 S.W.3d 160, 170 n.4 (Mo. banc 2011), the trial court addressed Count I and noted that “the resolution of Plaintiff's state law claims in Count II and III would necessarily require this Court to address the scope of Plaintiff's rights under the First Amendment because Missouri may not offer fewer protections to its citizens than required under the federal constitution.” In *Kansas City Premier Apartments, Inc.*, the Supreme Court of Missouri noted that our state constitution may only provide “more expansive protections than comparable federal constitutional provisions.” *Id.* We agree with the trial court.

In the first paragraph of Doe's petition, she states that she is seeking “declaratory judgment that Missouri laws criminalizing speech by Doe, about Doe's experiences as a state grand juror for the investigation of the matter known as *State of Missouri v. Darren Wilson*, do not apply to Doe as properly construed or are **unconstitutional as applied**.” (emphasis added). Doe also notes in her petition, citing *Butterworth*, 494 U.S. at 630, 110 S.Ct. 1376, that “the invocation of grand jury interests is not some talisman that dissolves all constitutional protections.” From our perspective, for Doe to succeed on her petition for declaratory judgment, the court would be required to find that Doe's constitutional rights would be violated unless the declaratory judgment were granted. The only constitutional right that Doe references in the petition is her freedom of speech. Thus, to fully address Doe's arguments, the trial court necessarily accounted for Doe's right to free speech under the Missouri Constitution.

The Supreme Court of Missouri has observed that the First Amendment to the United States Constitution and \*362 Article I, Sec. 8 of the Missouri Constitution are “comparable.” *State v. Vaughn*, 366 S.W.3d 513, 517 n.3 (Mo. banc 2012). Although Doe discussed her right to free speech under the Missouri Constitution, as opposed to the First Amendment, the trial court pointed out that any resolution of the issue in favor of McCulloch under Missouri's Constitution would inherently resolve Doe's First Amendment issue, as Missouri's Constitution cannot restrict

a person's rights beyond what the First Amendment permits. *Kansas City Premier Apartments, Inc.*, 344 S.W.3d at 170 n.4. We agree with the court's analysis. Accordingly, we find the trial court did not err in reaching the merits of Count I. Point denied.

#### f. Point III—Exceptions to Missouri Grand Jury Secrecy Statutes

[14] In Doe's third point on appeal, she argues the trial court erred in granting McCulloch's motion to dismiss because the trial court “misconstrued §§ 540.080, 540.310, 540.320, and the applicable law in that an exception applies to the general rules of grand juror secrecy in this case and the statutes are therefore inapplicable to Doe.”<sup>5</sup> At the outset of our analysis under Point III, it is important to note that there are no statutory exceptions to the laws mandated by the statutes at issue (§§ 540.080, 540.310, 540.320). Thus, Doe must rely on policy arguments and judicially-created exceptions.

[15] [16] We are mindful of the role of the judiciary: to enforce the laws enacted by the legislature and to try to effectuate the legislature's intent. *State ex rel. Koster v. Cowin*, 390 S.W.3d 239, 245 (Mo. App. W.D. 2013); *Weiss v. Rojanasathit*, 975 S.W.2d 113, 120 (Mo. banc 1998) (“Our function is to interpret the law; it is not to disregard the law as written by the General Assembly.”). “[P]olicy decisions are the province of the legislature.” *Koster*, 390 S.W.3d at 245 (citing *Goerlitz v. City of Maryville*, 333 S.W.3d 450, 456 (Mo. banc 2011)). “It is not our role to ‘question the wisdom, social desirability or economic policy underlying a statute as these are matters for the legislature's determination.’” *Id.* (quoting *Batek v. Curators of Univ. of Mo.*, 920 S.W.2d 895, 899 (Mo. banc 1996)). Courts have granted exceptions to grand jury secrecy statutes in very limited circumstances, and there must be exceptionally compelling reasons to do so. *State v. McGee*, 757 S.W.2d 321, 326 (Mo. App. W.D. 1988) (citing *State v. Greer*, 605 S.W.2d 93, 96 (Mo. banc 1980), *rev'd on other grounds*, *Missouri v. Greer*, 451 U.S. 1013, 101 S.Ct. 3000, 69 L.Ed.2d 385 (1981)) (“It is, however, the rule that grand jury proceedings are to be kept secret **except as statutes have specifically modified that rule**.”) (emphasis added).<sup>6</sup>

[17] In considering whether the circumstances of a case may necessitate an exception to the grand juror secrecy rules, we must weigh the reasons for secrecy against the present need for disclosure. *Mannon v. Frick*, 365 Mo. 1203, 295 S.W.2d 158, 164 (1956).

\*363 The reasons for the policy of secrecy in connection with grand jury proceedings ... are generally said to be: to protect the jurors themselves; to promote a complete freedom of disclosure; to prevent the escape of a person indicted before he may be arrested; to prevent the subornation of perjury in an effort to disprove facts there testified to; and to protect the reputations of persons against whom no indictment may be found.

*Id.* at 162. Specifically, Doe argues that “justice requires Doe be allowed to speak publicly about her experiences on the grand jury to correct the misinformation McCulloch provided to the public.” She also contends that McCulloch’s disclosures about the grand jury proceedings created “unusual circumstances.” After reviewing McCulloch’s statements identified by Doe, we do not find these arguments persuasive.<sup>7</sup> Specifically, Doe points to the following statements by McCulloch:

- Statement 1: “McCulloch said the jurors were therefore ‘able to assess the credibility of the witnesses, including those witnesses who[se] statements and testimony remained consistent throughout every interview and were consistent with the physical evidence.’ ”
- Statement 2: “McCulloch publicly announced that the jurors asked questions of every witness, requested specific witnesses, requested certain physical evidence, and asked that certain photographs be taken and presented to them.”
- Statement 3: “McCulloch then announced that the grand jurors ‘discussed and debated the evidence among themselves before arriving at their *collective decision*,’ [and] [h]e stated, ‘after their exhaustive review, the grand jury deliberated and ... determined that no probable cause exists to file any charges against Officer Wilson and returned a ‘no true bill’ on each of the five indictments.’ ”

Regarding Statement 1, Doe argues that the statement “impl[ies] all twelve of the jurors found the same witnesses to be credible.” We disagree. Statement 1 is a broad, generic statement that could apply to almost any grand jury proceeding. The statement is neutral; it could just as easily be used to explain why a grand jury chose to return a “true bill.” The same can be said about Statements 2 and 3; we view these articulations as neutral recitations of facts. We do not believe “collective” implies unanimity. Rather, we find “collective decision” describes the process of grand jury deliberations, not the outcome. The grand jury process inherently requires a

collective decision, as no indictment can be found without the concurrence of at least nine grand jurors. § 540.250. We agree with Doe’s stance that misrepresenting grand jury proceedings would reduce the benefits associated with secrecy—and disclosure of facts to correct any misinformation would be a benefit to the public’s interest. Nonetheless, the statements Doe references do not reveal any evidence or testimony that was presented to the grand jury, which is what Doe proposes to do.

Doe does not, in any way, limit the scope of the disclosures she seeks to make. In \*364 her petition, Doe states that the grand jury investigation differed “in significant ways from how evidence was presented in the *hundreds* of matters presented to the same grand jury earlier in its term,” and Doe “wishes to express opinions about ... [her] impression that evidence was presented differently than in other cases presented to the same grand jury.” (emphasis added). Thus, the exception Doe seeks in her petition is not just limited to Wilson’s grand jury proceedings; Doe seeks an exception that would allow her to disclose information from potentially “hundreds of matters.” Affording a grand juror unrestrained ability to disclose her interpretation of what happened in the proceedings completely destroys the idea of secrecy, which is crucial to the proper functioning of the grand jury process; the secrecy requirement promotes vitally important interests, such as protecting the jurors themselves, encouraging prospective witnesses to come forward and speak candidly, protecting the integrity of the grand jury process by shielding witnesses from threats, bribes, or other means of inducing fabricated testimony, *inter alia*. *Butterworth*, 494 U.S. at 630, 110 S.Ct. at 1380; *Douglas Oil Co.*, 441 U.S. at 218–19, 99 S.Ct. at 1672–73; *Mannon*, 295 S.W.2d at 164.

Doe also contends that the reasons for secrecy are “no longer relevant” and preventing disclosure “does not promote *any* recognized reasons for grand juror secrecy.” (emphasis added). Our Court accepts the idea that the benefits of grand jury secrecy are reduced after the proceedings at issue end. *Douglas Oil Co.*, 441 U.S. at 222, 99 S.Ct. at 1674. However, Doe ignores the fact that some reasons for secrecy extend beyond the particular grand jury at issue; disclosure of concluded grand jury proceedings can impact future cases. In *Douglas Oil Co.*, the Supreme Court of the United States explained:

For in considering the effects of disclosure on grand jury proceedings, the courts must consider not only the immediate effects upon a particular grand jury, but also

*the possible effect upon the functioning of future grand juries.* Persons called upon to testify will consider the likelihood that their testimony may one day be disclosed to outside parties. Fear of *future retribution or social stigma* may act as powerful deterrents to those who would come forward and aid the grand jury in the performance of its duties. Concern as to the *future consequences* of frank and full testimony is heightened where the witness is an employee of a company under investigation. Thus, the interests in grand jury secrecy, although reduced, are not eliminated merely because the grand jury has ended its activities.

*Id.* (emphasis added). Doe bears the burden of showing that the present need for disclosure outweighs the reasons for grand jury secrecy. The fact that the General Assembly has enumerated several statutes to help enforce the secrecy of grand jury proceedings without providing for any exception reflects the importance placed on grand jury secrecy in this state. This is further bolstered by the fact that judicially-crafted exceptions to grand jury secrecy statutes have only been granted in rare circumstances by this state's courts or other courts where similar grand jury secrecy rules exist.

Doe contends that her situation is similar to the grand jurors in *Palmentere*—the only case in which a court granted an exception to Missouri's grand jury secrecy laws to grand jury members. *Palmentere*, 205 F.Supp. at 261. However, we do not find the situations to be similar in any way. In *Palmentere*, a civil action was initiated by a witness to the grand jury proceedings against the twelve grand jurors. *Id.* at 262. \*365 The plaintiff-witness alleged that the defendant-grand jurors caused him to be subpoenaed to appear as a witness before the grand jury, and during that appearance, the grand jurors and an assistant prosecuting attorney caused him to be forcibly arrested without a warrant, thereby violating “his right not to be deprived of his life, liberty and property, without due process of law[.]” *Id.* at 262–63.

In response to the plaintiff-witness's allegations, the defendant-grand jurors filed motions in which they stated:

they are ready and willing to defend themselves on the merits of [the] cause of action both as to the facts and law, but that they cannot do so unless they may reveal to their counsel information to be embodied in pleadings, testify concerning, or otherwise used in such manner as may be necessary to a proper defense, and otherwise make full use of any and all proceedings and deliberations of the grand jury necessary to their defense.

*Id.* at 263. The United States District Court for the Western District of Missouri noted that “[t]he only question for determination by this court at this time is whether the grand jury may be freed from their oath of secrecy under the [Missouri] statute so that they may defend themselves against the plaintiff's charge of violating his civil rights.” *Id.* at 264. The district court held that the grand jurors may reveal information “as necessary to a proper defense of this action” but only “to such extent as necessary to meet the charges which have been made against them in the [c]omplaint filed in [that] case.” *Id.* at 268.

We find the facts in the case before us and *Palmentere* to be strikingly distinct. First, we note that the defendant grand jurors in *Palmentere* could only defend against the potential loss of property (via damages) by disclosing certain facts about the grand jury proceedings. *Id.* at 263. The district court noted that preventing the grand jurors from disclosing information would “prevent them from offering a proper defense and therefore the maintenance of [the] action would result in a deprivation of [those] defendants' property without due process of law in violation of the Constitution and the laws of the United States.” *Id.* Here, although Doe's alleged aspirations for disclosing grand jury information may aid her in her pursuits, we do not find that making specific disclosures about particular grand jury proceedings is necessary for her to reach many of her goals stated in the petition. For example, in paragraphs 34–36 in her petition, she alleges:

34. Plaintiff believes by sharing Plaintiff's experience, Plaintiff could aid in educating the public about how grand juries function.

35. Plaintiff would also like to use Plaintiff's own experiences to advocate for legislative change to the way grand juries are conducted in Missouri.

36. Plaintiff's views would add to the public debate—occurring in Missouri and across the country—about the proper role of state grand juries and whether they continue to serve their original purpose of protecting the accused, or are now increasingly used to deprive those accused of crimes of due process to which those individuals are otherwise entitled.

We believe Doe would be able to address all of these issues without specifically divulging details of particular proceedings. Unless the grand jurors in *Palmentere* were allowed to make limited relevant disclosures, the action would have “result[ed] in a deprivation of [the] defendants' property without due process of law in violation of the

Constitution and laws of the United \*366 States.” *Id.* at 263. In the present case, disclosure of occurrences, as Doe perceived them, is not necessary to pursue the aforementioned goals Doe cites in her petition.

Additionally, the exception granted by the district court in *Palmentere* was narrowly tailored to protect the defendant grand jurors themselves for a limited, specific goal. The exception allowed the grand jurors to make disclosures “as may be necessary” to mount a defense against the plaintiff’s allegations. *Id.* at 268. The subject matter of the disclosures sought by Doe is also vastly different than in *Palmentere*. In *Palmentere*, the district court found it of great importance that the subject matter of the disclosures fall outside the realm of “the legal function of a grand jury.” *Id.* The district court explained:

*Certainly a grand jury or a grand juror cannot be held to answer for any act within the area of the grand jury’s jurisdiction.* If this question had arisen over some matter pertaining to an indictment or some matter pertaining to an investigation which the grand jury was conducting, or were in the general area of its jurisdiction, there would be *no hesitancy* on the part of this court to [prohibit disclosure(s)].

*Id.* (emphasis added). The disclosures Doe wishes to make involve the essential functions of grand jury proceedings and the jury’s ultimate determination of whether there is sufficient evidence (i.e., probable cause) to indict a criminal suspect. Thus, the rationale articulated in *Palmentere* actually supports the findings of the trial court in this case. After considering relevant precedent and independently weighing the reasons for secrecy against the present need for disclosure based on the unique facts alleged in Doe’s petition, we decline to grant an exception contravening Missouri’s grand juror secrecy statutes. Accordingly, we deny Point III.

#### **g. Point IV—The Court’s Authority to Release a Grand Juror from Her Oath**

Finally, Doe argues the trial court erred in granting the motion to dismiss because it “misconstrued the authority of a circuit court to release a grand juror from her oath

of secrecy in that the circuit court retains jurisdiction to release a grand juror from her oath to keep the grand jury proceeding secret.” We find that this argument is without merit, as there is nothing on the record to suggest the trial court concluded it had no jurisdiction to entertain Doe’s claims. In fact, the court provided a very thorough, detailed explanation for the conclusions it reached in its fourteen-page Order and Judgment. Moreover, the court addressed the issue of jurisdiction specifically over three pages. The trial court concluded that “Plaintiff’s federal lawsuit was filed in the wrong venue, and that this Court has jurisdiction to hear all of Plaintiff’s claims.”

Doe also claims that the “court’s analysis of whether to release Doe from her oath under the circumstances of this case was constrained by its conclusion that there are no exceptions to grand jury secrecy.” Again, this is a clear misrepresentation. The trial court stated in its Order and Judgment, “[a]lthough disclosure of grand jury materials may be had when required by the public interest or in the protection of private rights, neither exception applies here.” Accordingly, Point IV is denied.

### **III. Conclusion**

Even assuming, as we must, that all facts alleged in the petition are true, we still find Doe has failed to establish she would be entitled to an exception to Missouri’s grand jury secrecy laws. Moreover, in regards to Doe’s second point on appeal, \*367 we find the trial court had authority to rule on Count I. Accordingly, we affirm the judgment of the trial court.

Mary K. Hoff, J., concurs.

Lisa S. Van Amburg, J., concurs.

#### **All Citations**

542 S.W.3d 354

#### **Footnotes**

- 1 All statutory citations are to RSMo 2000 as updated through the most recent cumulative supplement, unless otherwise indicated.
- 2 Doe did not challenge the applicability of § 540.120 in the petition before us.
- 3 The trial court explained:

[Doe] alleges that [sections 540.080, 540.310, and 540.320 of the Missouri Revised Statutes](#) are statutes that [McCulloch] enforces. But [McCulloch] cannot bring criminal charges against grand jurors who violate their oath or disclose their vote, and therefore, a declaratory judgment forbidding Defendant from enforcing [sections 540.080 or 540.310](#) against [Doe] would have no practical effect.

By acknowledging all three statutes and then explicitly stating that a declaratory judgment regarding only two of the statutes would have “no practical effect,” we believe the trial court was implicitly agreeing that a declaratory judgment regarding the enforcement of [§ 540.320](#) would have a practical effect.

4 All references to rules are to Missouri Supreme Court Rules of Criminal Procedure 2015.

5 Doe also argues that the trial court “reject[ed] the notion that an exception to grand jury secrecy could ever apply.” However, this is directly contradicted by the trial court’s Order and Judgment, which provides that “[a]lthough disclosure of grand jury materials may be had when required by the public interest or in the protection of private rights, neither exception applies here.”

6 In Plaintiff’s petition, she notes that, “[i]n Missouri, in the [the 98<sup>th</sup> General Assembly], House Joint Resolution 17 was proposed to repeal the state constitutional authorization for grand juries.” This proposed amendment did not make the Missouri ballot on November 8, 2016.

7 One of Doe’s sub-points under Point III is that McCulloch “recognized a relaxation of the original rule of secrecy” when he wanted to publicly disclose certain information about the proceedings, but he now takes the opposite position. McCulloch’s alleged inconsistency is not a relevant consideration for determining if an exception to the secrecy rules should apply. The substance of the disclosures is the important consideration, not McCulloch’s purported justification for making those disclosures.

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## KENTUCKY COMMONWEALTH'S ATTORNEYS ASSOCIATION

October 7, 2020

### **STATEMENT OF THE KENTUCKY COMMONWEALTH'S ATTORNEYS ASSOCIATION ON THE QUESTION OF GRAND JURY SECRECY AND THE ABILITY OF A FORMER GRAND JUROR TO DISCUSS PROCEEDINGS BEFORE AND BY THE GRAND JURY.**

This is the statement of the Kentucky Commonwealth's Attorneys' Association (KCAA), expressing its position on an issue pending in a case before the Jefferson Circuit Court that could have far-reaching deleterious effect on all other Circuit Courts in Kentucky. The KCAA does not intend to address the facts or circumstances of any particular case, but because a ruling in a single division of a circuit court in a highly publicized case may have immediate ramifications in all 57 circuits across the Commonwealth, KCAA needs to be on the record.

Kentucky is among the states whose constitution mandates that all felonies be prosecuted by grand jury indictment unless indictment is waived by the defendant. As a result, grand juries are required to consider thousands of cases in the Commonwealth every year. While the location where the grand jury meets, and the length of jury service varies from judicial circuit to judicial circuit, grand juries and Commonwealth's Attorneys are all governed in the performance of their duties by the Kentucky Criminal Rules of Procedure.

Since 1976, when the Judicial Article amended the Kentucky Constitution, Section 116 has given the Kentucky Supreme Court exclusive authority to prescribe rules for the Court of Justice, including the criminal rules under which a grand jury operates. The Kentucky Supreme Court has established 12 separate rules detailing grand jury procedures. The Rules of Criminal Procedure are laws and failure to follow them can result in the sanction of contempt of court, for all parties - including Commonwealth's Attorneys.

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Rule of Criminal Procedure 5.16(1) states that “The attorney for the Commonwealth shall cause all *testimony* to be recorded.” It does not say that all *proceedings* before the grand jury shall be recorded.

A grand jury is unique in the justice system. It is an exception to the general rule that court proceedings are public. Instead, the grand jury meets behind closed doors. During the testimony, only one witness at a time is present. Besides the witness, the only persons permitted to be present, other than the grand jurors themselves, are the prosecutor, and if required, a transcriptionist or interpreter, and the guardian of a minor child. Each exception is authorized by the Criminal Rules. A grand jury is instructed at the beginning of its term that it can exclude the prosecutor if it chooses to do so. And during deliberations and voting, no person, other than the grand jurors, shall be present. The grand jury speaks through its indictments and Kentucky Courts have held that grand jurors are not protected from civil liability for statements about alleged wrongdoing when no indictment has been returned.

Members of the KCAA believe the historical protections of grand jury secrecy are important and should not be set aside because of the dissatisfaction of a party or a grand juror or a victim. Criminal cases invariably leave one or more participant in the process aggrieved. Setting aside the important safeguard of secrecy because of disagreement with a result is essentially setting it aside for no special reason at all.

Grand jury secrecy is founded primarily on the protection of the innocent, protection of the criminal defendant, and protection of the grand jurors themselves. It protects the innocent because the grand jury frequently considers evidence against individuals and businesses that are not indicted for a criminal offense. Grand juries conduct investigations into possible criminal activity that is found to be insufficient to result in criminal charges. Secrecy protects those individuals from the public stigma that accompanies a statement that the person is “under investigation by the grand jury.”

Grand jury secrecy protects an accused because release of grand jury proceedings before trial may result in the release of information that a prosecutor is ethically prohibited from releasing to the public, such as confessions or the results of physical evidence implicating the defendant.

Nevertheless, the Rules of Criminal Procedure do not state that secrecy is absolute.

RCr. 5.24 is titled “Secrecy of proceedings; disclosure.” Subsection (1) says that “subject to the right of a person to procure a copy of the transcript or recording as provided by RCr. 5.16(3), and subject to the authority of the court to direct otherwise, all persons present during any part of the proceedings of a grand jury shall keep its proceedings and the testimony given before it secret, except that counsel may divulge such information as may be necessary in preparing the case for trial or other disposition.”

This rule states that the proceedings *and* the testimony shall be kept secret, clearly intending that not only the testimony but any other proceedings be secret. RCr. 5.24(3) states that violating the rules of secrecy can result in a finding of contempt of court.

The rules allow a court to direct that secrecy be waived, however, the emphasis placed on secrecy by the rules dictates that courts not waive the secrecy requirements without a legally compelling reason. For example, the testimony under oath of a grand jury witness could be released if that testimony was about an event which was the subject of another court action, such as when a shooting victim sued the shooter or where a criminal case in one jurisdiction resulted in a criminal case in another jurisdiction.

In cases where there are competing constitutional and due process rights such as the right of defendant to compel the attendance of a witness statement, which may have been made in the grand jury, or where a suit alleging false arrest or malicious prosecution requires the production of evidence about the grand jury proceedings, a court has a sound basis for waiving grand jury secrecy requirements. Individual dissatisfaction with a grand jury proceeding, or with another grand juror, or with the prosecutor's comments or legal interpretation are not compelling reasons to set aside the rules of grand jury secrecy.

Our Kentucky Supreme Court has an established rule-making process and amends the criminal and civil rules on a regular basis. If that Court decides in the future that the need for public disclosure supersedes the long history of grand jury secrecy should be changed, then it, and no other Kentucky court has the authority to do so.



**COMMONWEALTH OF  
KENTUCKY  
GRAND JURY  
HANDBOOK**



**JEFFERSON COUNTY  
OFFICE OF THE COMMONWEALTH'S ATTORNEY**





## Welcome to Grand Jury Service Commonwealth of Kentucky

Dear Grand Juror:

The Office of the Commonwealth's Attorney wants to welcome you as a member of the Grand Jury. By being selected for Grand Jury service, you have assumed one of the most important responsibilities in the administration of justice in your community. A properly functioning Grand Jury is responsible for safeguarding individuals from unfounded prosecutions and for protecting the general public from crime and criminals.

This handbook has been prepared to assist you in the administration of your duties. If you have any questions which are not answered in this publication or you want additional information, do not hesitate to ask the Assistant Commonwealth's Attorney assigned to the Grand Jury to assist you.

You may also access our website ([louisvilleprosecutor.com](http://louisvilleprosecutor.com)) for more information regarding the Jefferson County Office of the Commonwealth's Attorney. I hope you find your Grand Jury experience as rewarding and enriching as other Grand Jurors who have served. You are encouraged to share the knowledge you obtain regarding the criminal justice system with your relatives, neighbors and friends.

Thomas B. Wine  
Jefferson County Commonwealth's Attorney



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## INTRODUCTION – GRAND JURY SERVICE

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The Grand Jury is a body of 12 Citizens who decide whether there is sufficient evidence in a criminal case to warrant further prosecution by the state. No one should stand trial before there has been a demonstration of sufficient evidence to support an indictment, and no one should be required to bear the expense and worry of a defense against a frivolous charge.

In Kentucky, jurors are selected by jury commissioners appointed by the Court or by computer.

If the selection is by jury commissioners, the commissioners take the names of citizens for jury service from Jefferson County voter registration, registered drivers /ID list and persons filing Kentucky individual tax returns. Selected names are placed into a wheel which is delivered to the circuit clerk.

An alternative method of randomly selecting jurors can be elected by the Chief Circuit Judge, who, with the approval of the Chief Justice of the Supreme Court, can request the selection of names of prospective jurors from a computer which contains a list of the county's registered voters, licensed drivers/Kentucky ID card and Kentucky State tax payers. All of the people chosen are summoned to appear in Court and names are drawn by the Circuit Court Clerk at random until twelve qualified and available persons are selected and sworn to serve as Grand Jurors. Those selected as a Jefferson County Grand Juror serve for the month they were selected.

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## INTRODUCTION – GRAND JURY SERVICE

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A prospective juror is disqualified to serve on jury duty if he/she:

- 1) Is not a citizen of the United States; or
- 2) Is not a resident of this County; or
- 3) Is unable to speak and understand the English language; or
- 4) Is incapable, by reason of physical or mental disability, of rendering effective jury service; or
- 5) Has been previously convicted of a felony and has not been pardoned by an authorized person of the jurisdiction in which he was convicted; or
- 6) Is presently under indictment; or
- 7) Has served on a jury within the past twenty-four (24) months.

The authority of any particular Grand Jury exists only during the time in which that Grand Jury is in session. The Grand Jury may, however, recommend to the next Grand Jury that it pursue any business that is not completed.

Service on a Grand Jury has long been considered one of the highest duties of citizenship and a unique opportunity for the individual citizen to participate in the administration of justice. Historically, the function of the Grand Jury has been to protect the innocent from hasty, malicious and oppressive prosecution and to ensure that criminal charges against an individual are founded on sufficient and competent evidence.

### **WHAT IS A CRIME?**

There are basically two kinds of law – civil and criminal. The Grand Jury is only concerned with criminal matters. In order to aid you in the performance of your duties, this section will help you understand the difference between the two.

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## INTRODUCTION – GRAND JURY SERVICE

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Civil law deals with situations where there is a dispute between two or more people. The community itself does not suffer any wrong. For example, Mr. Smith accidentally runs his car into Mr. Jones' truck. If these two individuals cannot agree to settle the damages out of court, a civil suit is filed so that a court and jury can decide who is negligent in the accident and who is responsible for the damages resulting from the accident.

In contrast, if Mr. Smith intentionally shoots Mr. Jones, the act is criminal. Not only is Mr. Jones injured, but society as a whole is injured. Why? Because Mr. Smith's act of shooting someone poses a threat to all of us. We, as a law abiding society, have decided that anyone who acts in this manner should be punished. When this case goes through the criminal justice system, Mr. Smith may be found guilty of a crime and imprisoned. A crime takes place when an injury or wrong occurs not only to an individual but to society as a whole. Society, by enactment of criminal laws, imposes penalties for this type of conduct.

### **HOW DOES A CASE COME BEFORE THE GRAND JURY?**

When a crime has been committed it will come to the Grand Jury in one of two ways. First, a private citizen may file a complaint accusing another individual of a criminal act and a Judge may issue a warrant or the police may arrest an individual for committing a criminal act. The person accused will then appear before the District Court and a date will be set for a preliminary hearing. At the preliminary hearing, the judge will determine whether the crime charged is a felony and whether there is probable cause to believe that the accused person committed the crime. If the crime committed is a misdemeanor charge, then it will be adjudicated in District Court. If the District Court Judge determines the crime to be a felony charge, he/she must hold it to the next Grand Jury for consideration. A defense attorney may waive the preliminary hearing and waive the

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## INTRODUCTION – GRAND JURY SERVICE

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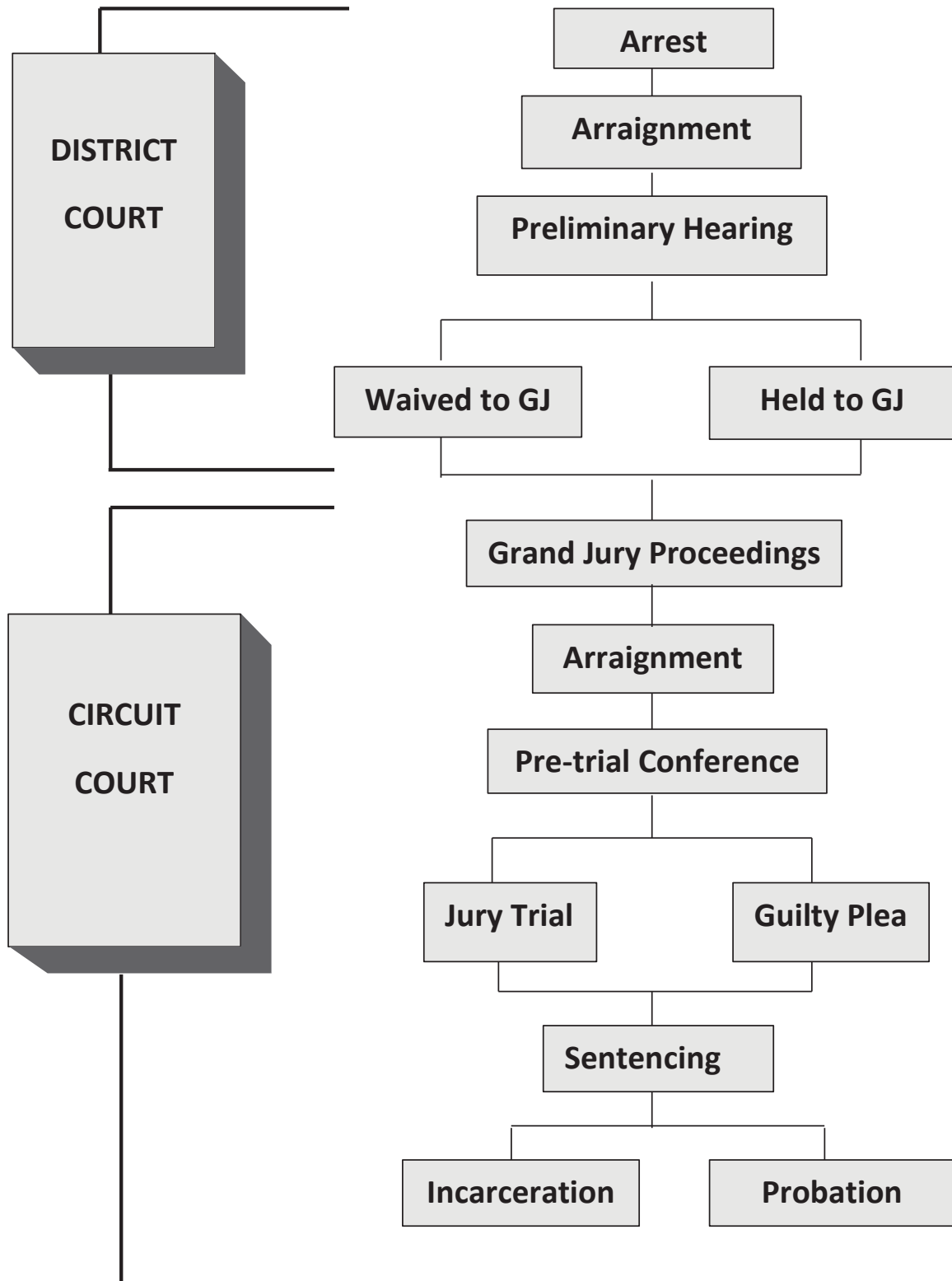
case to the Grand Jury. By statute, the District Court cannot convict people of felony charges. Felony charges must first be presented to the Grand Jury, which, as a body, determines whether there is sufficient competent evidence to return an indictment charging the accused. If so, the accused stands trial on the charges in the Circuit Court. The vast majority of cases arrive before the Grand Jury in this manner.

The second way a case comes to the Grand Jury is by direct presentation of a charge or charges. The Grand Jury may hear evidence on cases that have never come through the District Court. These presentations of evidence are called “direct submissions.” They are presented directly to the Grand Jury for various reasons, including the nature of the charges, the urgency of the situation or the necessity of secrecy in the matter for the protection of the victims or witnesses in the matter.

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## DIAGRAM OF THE CRIMINAL COURT PROCESS

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## THE GRAND JURY IN ACTION

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### RETURN OF INDICTMENTS OR DISMISSAL OF CHARGES

The most important duty of a Grand Jury is to evaluate evidence and determine whether there is sufficient competent evidence to believe that a crime has been committed by a specific individual. If the Grand Jury so determines, an indictment will be returned. If however, the Grand Jury determines there is not sufficient evidence to believe the accused committed the crime, or that any crime has been committed, the Grand Jury will dismiss the charge. In this respect, the Grand Jury safeguards the rights of the victim, the accused and society.

In order for an accused to be convicted of a crime, he must be found guilty by a Petit Jury (trial jury) using the standard of “proof beyond a reasonable doubt” after hearing all the evidence in the Circuit Court. The Grand Jury **should not** apply this standard. Your burden of proof is whether there is “sufficient evidence” in the case to require the defendant to stand trial. You do not decide if the defendant is guilty – that is the duty of the trial Petit Jury.

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## THE GRAND JURY IN ACTION

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### **CRIMES COMMITTED BY A JUVENILE**

The Grand Jury may hear evidence of criminal conduct alleged to have been committed by a juvenile. A juvenile is defined by Kentucky law as a person who was under the age of eighteen years when the offense occurred. Normally, all juvenile matters are adjudicated in the juvenile session of Family Court or District Court; however, the Judge of that court may transfer charges to the Grand Jury for consideration by determining that the seriousness of the offense and the circumstances of the offense and the juvenile warrant trying the juvenile as an adult. The Judge of that court may also transfer cases to Circuit Court if the juvenile was over the age of fourteen at the time of the commission of the offense and a felony offense involving the use of a firearm was committed. The Grand Jury may then return an indictment treating the juvenile as an adult, or may direct that the juvenile be transferred back to Juvenile Court or may dismiss the charges if there is insufficient evidence.

### **WITNESSES AND EVIDENCE BEFORE THE GRAND JURY**

Witnesses will appear before the Grand Jury one at a time. Each witness will be sworn by the foreperson of the Grand Jury to tell the truth. The Commonwealth's Attorney or Assistant will then question the witness about their knowledge of the case. Before the witness is excused, each Grand Juror will be given the opportunity to ask pertinent

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## THE GRAND JURY IN ACTION

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questions of the witness. When all the evidence has been presented, the Grand Jury will decide whether that evidence warrants an indictment. At least nine members of a Grand Jury must agree in order to return an indictment. If less than nine members agree to return an indictment, the case will be dismissed; that is called a “No True Bill”.

After hearing testimony from the victim, the police or other witnesses, the Grand Jury may decide that there are other witnesses or evidence it needs in coming to a decision. By majority vote, the Grand Jury may request that subpoenas be issued for additional witnesses or evidence. The foreperson should make the Commonwealth’s Attorney aware of any such requests by the Grand Jury.

The Fifth Amendment to the United States Constitution and Section 11 of the Kentucky Constitution guarantee people the right against self-incrimination. If a witness refuses to testify or answer questions, the foreperson, with the Commonwealth’s Attorney, must appear before the Circuit Court and present the questions that the witness refuses to answer. The Court will then determine whether a response to the question might incriminate the witness. If the Court rules that the answer will not incriminate the witness or that the witness has voluntarily given up his privilege against self-incrimination and the witness still refuses to answer, then the Judge can order the witness to jail for contempt of court.

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## THE GRAND JURY IN ACTION

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The Grand Jury has the right to exclude the attorney for the Commonwealth while questioning witnesses. However, any testimony received in this manner must be recorded as required by the Rules of Criminal Procedure.

Always consider the evidence as objectively as possible. Do not be swayed by emotional appeals to your sympathy. If you return an indictment and the case goes to trial, all relevant circumstances which are admissible will be considered by the Court and Petit Jury. Remember though, the Grand Jury must answer two primary questions:

1. Is there sufficient evidence a crime has been committed in this jurisdiction? and;
2. Is there sufficient evident the accused committed the crime?

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## HOW THE GRAND JURY FUNCTIONS

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### THE FOREPERSON

The first order of business for any new Grand Jury is to elect one of its number as the foreperson. The duties of the foreperson are to give an oath to each witness to tell the truth (a card with the oath on it will be provided), to sign all documents that will be issued by the Grand Jury, to present the results to the Commonwealth's Attorney of all jury deliberations and to act as a liaison between the Grand Jury and the Commonwealth's Attorney. The foreperson should also keep the Grand Jury operating in an orderly fashion.

### ROLE OF THE COMMONWEALTH'S ATTORNEY OR DESIGNEE:

1. To attend all sessions of the Grand Jury and act as the legal advisor to the Grand Jury.
2. Issue subpoenas for the attendance of witnesses and the production of evidence.
3. Prepare indictments, dismissals or other orders, as needed by the Grand Jury and at the Grand Jury's request.
4. Assist in the preparation of the final report.

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## HOW THE GRAND JURY FUNCTIONS

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### SECRECY OF GRAND JURY PROCEEDINGS

The Rules of Criminal Procedure require that all testimony and evidence presented before a Grand Jury must be kept secret unless otherwise ordered by the Court. This admonition applies to the Commonwealth's Attorney or any of his/her Assistants who may be present and all Grand Jurors. No one may examine a Grand Juror on what a witness said, what any other Grand Juror said, or how any Grand Juror voted. No person except the attorney or attorneys for the Commonwealth, the witness under examination, an interpreter if necessary, a parent, guardian or custodian of a minor witness, and the Grand Jurors shall be present while the Grand Jury is in session. Only twelve (12) Grand Jurors shall be present while the Grand Jury is deliberating or voting. Violation of the secrecy admonition or presence of persons other than Grand Jurors while the Grand Jury is deliberating or voting is punishable by contempt of court.

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## HOW THE GRAND JURY FUNCTIONS

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### GRAND JURY DELIBERATIONS AND VOTING

After the witnesses and evidence have been presented to the Grand Jury, it is then time for the Grand Jurors to discuss among themselves whether an indictment should be returned, whether the charge should be dismissed, or whether more testimony or evidence is necessary in order to reach a decision. The results of the Grand Jury's deliberation are to be communicated only to the Commonwealth's Attorney or the assigned Assistant Commonwealth's Attorney.

Any indictment returned by the Grand Jury must be endorsed "A True Bill" and signed by the foreperson. The foreperson may not agree with nine or more of the other jurors. All dismissals must be stamped "No True Bill" and endorsed by the foreperson. The names of all witnesses who testified before the Grand Jury must appear on the indictment. The completed indictment or an order of dismissal is then presented to the Court and read by the Circuit Clerk. All twelve jurors must be present while the jury is in session, deliberating or voting, and when returning its finding in open Court.

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## HOW THE GRAND JURY FUNCTIONS

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### INDEPENDENCE OF THE GRAND JURY

The Grand Jury is an independent accusatorial and investigative body. However, individual Grand Jurors are not authorized to conduct an investigation; all actions taken by the Grand Jury must be as a group. You are assisted and advised by the Commonwealth's Attorney and his or her staff; however, you are not a part of Office of the Commonwealth's Attorney. The Grand Jury's responsibility is to your fellow citizens and the Court.

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## SUGGESTIONS TO MAKE YOUR TENURE AS A GRAND JUROR SUCCESSFUL

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1. Attend all sessions of the Grand Jury; arrive at the hearing on time. Not only your fellow jurors but the public are depending on you; and all twelve jurors must be present in order to conduct business.
2. Pay close attention to the testimony given and the evidence presented; the reputation or freedom of someone depends on what you will hear and see.
3. Be courteous to the witness and to your fellow jurors; do not try to monopolize the hearings or the deliberations; do not disclose to any witness what the testimony of a prior witness was.
4. The foreperson should administer the oath to a witness in a professional manner that impresses on the witness that the Grand Jury session is a serious judicial hearing and that he or she must tell the truth. The foreperson should raise his or her right hand, direct the witness to raise his or her right hand and forcefully give the oath to tell the truth.
5. Listen to the evidence and the opinions of fellow jurors during deliberations.
6. Be independent but not stubborn; keep an open mind until all has been said by each juror.
7. Be absolutely fair. Because of the secrecy of the hearing no one may inquire into what you have done.
8. All jurors have an equal voice in determining whether there is sufficient evidence to believe the accused committed the crime charged.

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## SUGGESTIONS TO MAKE YOUR TENURE AS A GRAND JUROR SUCCESSFUL

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9. Be convinced of the probable guilt of the accused before voting for an indictment. If you think there is other evidence that may explain the charge against the individual, talk to your fellow jurors about it. If you can convince a majority of the jurors, have the foreperson notify the Commonwealth's Attorney to subpoena the necessary person or information.
10. If you have personal knowledge relating to a charge or witness who testifies, tell your fellow jurors. If you feel that you would be personally biased in a particular case, you may abstain from voting but you are not required to do so.
11. Each juror has the right to direct questions to any witness. Try to keep your questions germane and to the point, refraining from asking about unrelated subjects or sharing personal experiences.
12. If you have personal knowledge of a criminal violation occurring, you should report your information to the Commonwealth's Attorney and the Grand Jury for investigation.
13. If you are contacted by anyone, including but not limited to, news media representatives, about any business you or the Grand Jury has conducted while in session, politely advise the individual you have been sworn by the Court and instructed not to disclose any information in regard to Grand Jury actions; then notify the Commonwealth's Attorney of this contact.

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## SUGGESTIONS TO MAKE YOUR TENURE AS A GRAND JUROR SUCCESSFUL

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14. You will receive \$12.50 each day of attendance as a Grand Juror. The Circuit Clerk, if necessary, will prepare for you an affidavit acknowledging your service and salary.
15. The Jefferson County Grand Jury normally meets at 8:15 a.m. The session continues until business is completed for the day. If other sessions are necessary, you will know in advance so that appropriate arrangements can be made in your schedule.
16. If at any time you have any questions or need explanations, do not hesitate to ask. It is the job of the Commonwealth's Attorney to assist you in any way possible in the performance of your duties as a member of the Grand Jury.

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## AFTER THE GRAND JURY

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After you have finished your term of jury duty, we hope you will consider it as a service to the community and yourself. Hopefully, it will increase your awareness and interest in government and civic affairs. You should have a greater understanding of the nature of crimes and the possible ramifications of the commission of those crimes. Also, you may be able to understand why the maximum penalties are not levied in each and every case and why it is necessary for the prosecution and the Court to use discretion in arriving at the proper outcome in each case. Your tenure as a Grand Juror should impress upon you the obligations each individual has to contribute to fair and impartial law enforcement in your community. If you and other Grand Jurors have done your job well, both our community and government will be improved.

We again urge you to share, without divulging the content of any Grand Jury hearings, your experiences in the criminal justice system with your family, friends and neighbors. Only by educating the entire community about the problems which confront the enforcement of our laws will we be able to best serve each and every individual in the community. You, as a knowledgeable representative, can be of great service in sharing such information.

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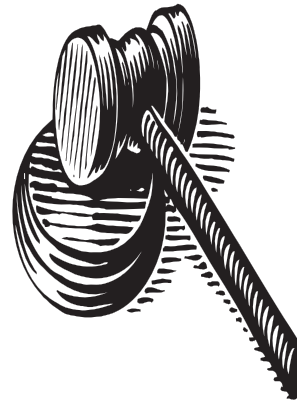
## TERMS TO BE FAMILIAR WITH

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**BOND** - The document, normally backed by money or property, which guarantees that the person charged with a crime will appear before the Court.

**CIVIL LAW** - The division of law relating to private rights and remedies which involve private individuals, corporations or other entities.

**CRIMINAL LAW** - The division of law which attempts to prevent harm to society by declaring what conduct is prohibited and by attaching a punishment or penalty for its violation.



**DIRECT SUBMISSION** - A criminal charge against an individual that comes directly to the Grand Jury for consideration without first being heard in District Court.

**INDICTMENT** - The written formal charge of a crime returned by the Grand Jury, stating that a particular person has committed some act which has been designated by society as a crime.

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## TERMS TO BE FAMILIAR WITH

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**FELONY** - Any crime which is punishable by confinement in the penitentiary or reformatory for one year or more. Felonies are divided into four classifications:

CLASS	PUNISHMENT
CAPITAL	DEATH; LIFE WITHOUT PAROLE; LIFE WITHOUT PAROLE FOR A MINIMUM OF 25 YEARS; LIFE; OR 20 YEARS TO 50 YEARS
CLASS A	20 YEARS TO 50 YEARS OF LIFE
CLASS B	10 TO 20 YEARS
CLASS C	5 TO 10 YEARS
CLASS D	1 TO 5 YEARS

Fines may also be imposed upon conviction for any felony. The Circuit Court has exclusive jurisdiction of felonies.

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## TERMS TO BE FAMILIAR WITH

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**K.R.S.** - Kentucky Revised Statutes. (The codified laws of this state)

**MISDEMEANOR** - Any crime which is punishable by confinement in the county jail and/or by the imposition of a fine not to exceed \$500. Misdemeanors are divided into three classifications:

CLASS	PUNISHMENT
CLASS A	UP TO 12 MONTHS IN COUNTY JAIL AND/OR UP TO \$500 FINE*
CLASS B	UP TO 90 DAYS IN COUNTY JAIL AND/OR UP TO \$250 FINE
VIOLATION	UP TO \$250 FINE

\*Certain misdemeanors may have a maximum fine exceeding \$500

The Grand Jury hears misdemeanor charges when the misdemeanor is joined with a felony offense. If an indictment with only misdemeanors is returned, it is referred back (remanded) to the District Court which has exclusive jurisdiction of misdemeanors.

**DISMISSAL** – (No True Bill) The decision by a Grand Jury not to indict a person. This decision must be reported to the Court in writing.

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## TERMS TO BE FAMILIAR WITH

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**VIOLENT OFFENDER** – A violent offender is a person who was convicted of or who pleaded guilty to:

- a) A capital offense;
- b) A Class A Felony;
- c) A Class B felony involving the death of the victim or serious physical injury to a victim;
- d) The commission or attempted commission of a felony sexual offense described in KRS Chapter 510;
- e) Use of a minor in a sexual performance as described in KRS 531.310;
- f) Promoting a sexual performance by minor as described in KRS 531.320;
- g) Unlawful transaction with a minor in the first degree as described in KRS 530.064(1)(a);
- h) Promoting prostitution in the first degree as described in KRS 529.030(1)(b);
- i) Criminal abuse in the first degree as described in KRS 508.100;
- j) Burglary in the first degree accompanied by the commission or attempted commission of an assault described in KRS 508.010 (first degree assault), 508.020 (second degree assault), 508.032 (domestic violence assault), or 508.060 (first degree wanton endangerment);
- k) Burglary in the first degree accompanied by commission or attempted commission of kidnapping as prohibited by 502.040; or
- l) Robbery in the first degree.

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## TERMS TO BE FAMILIAR WITH

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A violent offender who has been convicted of or pleaded guilty to a capital offense (murder or kidnapping where the victim died), a class A felony, or a class B felony, must serve the lesser of 85% of the sentence or 20 years before he/she may be considered for parole by the Parole Board, unless a sentence of life without parole for 25 years or life without parole was imposed. The violent offender statute has been amended several times, and the specific crimes which qualified as violent offenses and the potential parole consequences may be different for crimes committed prior to July 12, 2006.

**PAROLE** - Early release of a convicted felon from the penitentiary or reformatory with certain conditions, violations of which may result in the felon's return to custody. In Kentucky, the Parole Board, whose members are appointed by the Governor, are responsible for determining whether a prisoner should be released and the conditions of any such release.

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## TERMS TO BE FAMILIAR WITH

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**PERJURY** - The crime of knowingly, making a material false statement in a judicial proceeding by one who has taken an oath to tell the truth.

**PERSISTENT FELONY OFFENDER (PFO)** - This is an individual who has previously been convicted of one or more felony offenses. Punishment provided is a penalty enhancement of the underlying charge for which the defendant must be convicted before the PFO statute comes into play.

A **PFO in the First Degree** must be 21 years of age and have been convicted of at least two separate prior felonies.

A **PFO in the Second Degree** must also be 21 years of age but only has one prior felony conviction.

**PETIT JURY** - The jurors chosen to sit for the trial of a person charged with a crime who make a finding of guilty or not guilty. They must find the defendant guilty "beyond a reasonable doubt." The verdict rendered by them must be unanimous.

**PLEA NEGOTIATION** - Plea negotiation is an aspect of the criminal justice process which allows speedy disposition of cases without necessity of trial. Under a negotiated plea, a defendant will plead guilty to one or

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## TERMS TO BE FAMILIAR WITH

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more of the charges or to an amended charge and the prosecutor will recommend a penalty to the judge.

**PROBABLE CAUSE** - Facts found to exist so that a reasonable, intelligent and prudent person could believe that the accused has probably committed the crime charged.

**PROBATION** - The conditional release of a person who has been convicted of a crime and sentenced to a term of imprisonment. Conditions are attached to the release and, if they are not followed by the defendant, he/she may be required to serve his term of imprisonment.

**TRUE BILL** - The endorsement made by the Grand Jury that at least nine of the twelve jurors believe the evidence presented supports an indictment against the accused.

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## NOTES

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**The Jefferson County Office of the Commonwealth's Attorney does not discriminate on the basis of race, color, national origin, sex, religion, age or disability in employment or in the provision of services and provides, upon request, reasonable accommodation necessary to afford individuals with disabilities an equal opportunity to participate in all programs and activities.**





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